CA1
SWC
-1999
W51

Government
Publications

Women and the *Canadian Human Rights Act*: A collection of policy research reports

31761 11638175 7

Policy Research
Recherche
en matière de politiques

Status of Women Canada
Condition féminine Canada

Canada

Government
Publications

Women and the *Canadian Human Rights Act*: A collection of policy research reports



LIBRARY
MAR - 8 2000
UNIVERSITY OF TORONTO

Women and the *Canadian Human Rights Act*: A collection of policy research reports

By

Donna Greschner and Mark Prescott

Martha Jackman and Bruce Porter

Shelagh Day and Gwen Brodsky

Sandy Welsh, Myrna Dawson and Elizabeth Griffiths

The research and publication of this study were funded by Status of Women Canada's Policy Research Fund. This document expresses the views of the authors and does not necessarily represent the official policy of Status of Women Canada or the Government of Canada.

September 1999

Status of Women Canada is committed to ensuring that all research produced through the Policy Research Fund adheres to high methodological, ethical and professional standards. The research must also make a unique, value-added contribution to current policy debates, and be useful to policy makers, researchers, women's organizations, communities and others interested in the policy process. Each paper is anonymously reviewed by specialists in the field, and comments are solicited on:

- the accuracy, completeness and timeliness of the information presented;
- the extent to which the analysis and recommendations are supported by the methodology used and the data collected; and
- the original contribution that the report would make to existing work on this subject, and its usefulness to equality-seeking organizations, advocacy communities, government policy makers, researchers and other target audiences.

Status of Women Canada thanks those who contributed to this peer review process.

Canadian Cataloguing in Publication Data

Women and the *Canadian Human Rights Act*: A collection of policy research reports

Issued also in French under title: Les femmes et la *Loi canadienne sur les droits de la personne* : recueil de rapports de recherche en matière de politiques
Includes bibliographical references.
Issued also in electronic format through the Internet computer network.
Contents: Should the CHRA mirror the Charter? / Donna Greschner, Mark Prescott.
– Women's inequality and the CHRA / Shelagh Day, Gwen Brodsky.
– Women's substantive equality and the protection of social and economic rights under the *Canadian Human Rights Act* / Martha Jackman, J. Bruce Porter.
– Sexual harassment and the Canadian Human Rights Commission / Sandy Welsh, Myrna Dawson, Elizabeth Griffiths.

ISBN 0-662-28157-8
Cat. no. SW21-43/1999E

1. Women's rights — Canada.
2. Sex discrimination against women — Law and legislation — Canada.
3. Canada. *Canadian Human Rights Act*.
4. Women — Canada — Economic conditions.
4. Women — Canada — Social conditions.
I. Greschner, Donna. Should the CHRA mirror the Charter?
II. Day, Shelagh. Women's inequality and the CHRA.
III. Jackman, Martha. Women's substantive equality and the protection of social and economic rights under the *Canadian Human Rights Act*.
IV. Welsh, Sandy. Sexual harassment and the Canadian Human Rights Commission.
V. Canada. Status of Women Canada.

KE4381.W65 1999 342.71'0878 C99-980340-9

Project Managers: Julie Dompierre and Beck Dysart, Status of Women Canada
Publishing Coordinators: Anne Schroder and Mary Trafford, Status of Women Canada
Editing: PMF Editorial Services Inc. / PMF Services de rédaction inc.
Translation: PMF Editorial Services Inc. / PMF Services de rédaction inc.

For more information contact:
Research Directorate
Status of Women Canada
350 Albert Street, 5th Floor
Ottawa, Ontario K1A 1C3
Telephone: (613) 995-7835
Facsimile: (613) 957-3359
TDD: (613) 996-1322
Email: research@swc-cfc.gc.ca

This document is also available for download on the Status of Women Canada Web site at: http://www.swc.cfc.gc.ca/

PREFACE

Status of Women Canada's Policy Research Fund was instituted in 1996 to support independent, nationally relevant policy research on gender equality issues. Public consultations held in 1996 on the structure and priorities of the Policy Research Fund identified the need to fund both long-term emerging issues and urgent issues. Urgent issues are defined as those currently on the public policy agenda, where time is of the essence, the gender dimension may not be adequately debated and there is an opportunity to effect change by participating in the policy process.

Women and the *Canadian Human Rights Act* was identified as an urgent issue by the External Committee to the Policy Research Fund in response to the announcement by the Honourable Anne McLellan, Minister of Justice, on April 8, 1999 of a review of human rights protection in Canada. The Minister appointed a review panel and asked that the panel report to her with recommendations for improving the *Canadian Human Rights Act* (CHRA) by April 8, 2000. The review panel is scheduled to begin a series of consultations with employers, labour organizations, equality advocacy groups, federal government departments and other interested parties in September 1999.

Given the need to ensure a gender perspective in the public debate, an urgent call for research proposals on **Women and the CHRA** was issued in June 1999. The proposals were assessed by Status of Women Canada and external reviewers, and the following four research projects were selected for funding.

- **Should the CHRA Mirror the Charter? by Donna Greschner and Mark Prescott**. This report looks at whether the CHRA should contain an open-ended clause, one that would prohibit discrimination on grounds other than those specifically listed in the Act. The report analyzes three approaches: an unreasonable cause provision, a group membership approach and, finally, a version amending the CHRA to mirror s. 15 of the *Canadian Charter of Rights and Freedoms.* The report concludes that an open-ended list would cause more problems than it solves.

- **Women's Substantive Equality and the Protection of Social and Economic Rights under the *Canadian Human Rights Act* by Martha Jackman and Bruce Porter**. This report examines the issue of whether, and how, social and economic rights can be effectively protected under the *Canadian Human Rights Act*. The report reviews the specific findings and recommendations of UN treaty-monitoring bodies, examining this issue from a domestic perspective and considering how new social and economic rights guarantees under the CHRA should be formulated. The report concludes that recognizing social and economic rights in the CHRA is necessary, not only to bring Canada into compliance with its international human rights obligations, but to ensure federal human rights law promotes the dignity and substantive equality of all women.

- **Women's Economic Inequality and the *Canadian Human Rights Act* by Shelagh Day and Gwen Brodsky**. One proposal under consideration during the current review of the CHRA is adding the ground social condition to the list of prohibited grounds of discrimination, which will provide protection from discrimination occurring because of the negative stereotyping of people with low incomes. However, this report argues that its addition will not address the poverty and economic inequality that are manifestations of long-standing discrimination based on sex, race and disability. The report concludes that the CHRA needs to be reframed so it explicitly recognizes group disadvantage, including the persistent group disadvantage of women, and makes specific commitments to the elimination of women's social and economic disadvantage.

- **Sexual Harassment Complaints and the Canadian Human Rights Commission by Sandy Welsh, Myrna Dawson and Elizabeth Griffiths**. An analysis of 453 sexual harassment complaints filed by women against both corporate and individual respondents between 1978 and 1993 is presented in this report. This study examines dispositions, remedies, length of time to case resolution and the amount of monetary compensation awarded in sexual harassment complaints reported to the CHRC. The report suggests that improvements regarding time to case resolution and ease of reporting without repercussions should be important components of future policy agendas promoting the status of women in Canada.

The objective of Status of Women Canada's Policy Research Fund is to enhance public debate on gender equality issues and contribute to the ability of individuals and organizations to participate more effectively in the policy development process. We believe that good policy research leads to good policies. We thank all the authors and reviewers for their contribution to this objective.

TABLE OF CONTENTS

Should the CHRA Mirror the Charter?
Donna Greschner and Mark Prescott 1

Women's Substantive Equality and the Protection of Social and Economic Rights under the *Canadian Human Rights Act*
Martha Jackman and Bruce Porter 43

Women's Economic Inequality and the *Canadian Human Rights Act*
Shelagh Day and Gwen Brodsky 113

Sexual Harassment Complaints and the Canadian Human Rights Commission
Sandy Welsh, Myrna Dawson and Elizabeth Griffiths 177


Digitized by the Internet Archive
in 2023 with funding from
University of Toronto

https://archive.org/details/31761116381757

SHOULD THE CHRA MIRROR THE CHARTER?

Donna Greschner

and

Mark Prescott

ABSTRACT

This report concludes that the *Canadian Human Rights Act* (CHRA) should not contain an open-ended clause, one that would prohibit discrimination on grounds other than those specifically listed in the Act. One variant of an open-ended clause, an "unreasonable cause" provision, would reintroduce the discredited "distinction" approach to equality issues, with its attendant negative consequences for women's equality. Another version would amend the CHRA to mirror s. 15 of the *Canadian Charter of Rights and Freedoms,* thus likely incorporating into the CHRA the same analogous grounds that courts include in s. 15. It would not effectively address specific inequalities experienced by women, such as those resulting from poverty. Furthermore, it could reinforce several negative features of the current Canadian human rights system, such as valorizing the "prohibited ground" approach to redressing women's inequalities. The report concludes that an open-ended list would cause more problems than it solves. On balance, having an open-ended list will not produce sufficient gains for women's equality to justify the efforts in lobbying for it and litigating its application.

TABLE OF CONTENTS

EXECUTIVE SUMMARY 4

1. THE CURRENT CONTEXT 6
   - The *Canadian Human Rights Act* 6
   - Section 15 of the Charter 8
   - Comparison of the CHRA and the Charter 9

2. OPEN-ENDED CLAUSES IN HUMAN RIGHTS LEGISLATION 12
   - Options for the CHRA 12
   - An Unreasonable Cause Provision: The B.C. Experience 13
   - A Group Membership Approach: The Manitoba Experience 15

3. ANALYSIS OF AN ANALOGOUS GROUND PROVISION IN THE CHRA 16
   - Responding to New Developments 16
   - Avoiding an Unconstitutional Gap 17
   - Reinforcing the Prohibited Grounds Approach 18
   - Diverting Resources from the Political Process 19
   - Inefficiently Using Commission Resources 21
   - Statutory Law May Become Too Much Like the Constitution 22

4. CASE STUDY: THE INEQUALITY OF POVERTY 24

5. CONCLUSION 26

BIBLIOGRAPHY 27

APPENDICES
- A: SELECTED CONSTITUTIONAL PROVISIONS 30
- B: OPTIONS FOR THE CHRA – POSSIBLE WORDING 31
- C: B.C. EXPERIENCE WITH AN UNREASONABLE CAUSE PROVISION 34
- D: THE MANITOBA EXPERIENCE 40

EXECUTIVE SUMMARY

Since its inception, Canadian human rights legislation, with only several exceptions, has prohibited discrimination on a closed list of grounds. Claimants must show that they suffer discrimination on the basis of one or more of the prohibited grounds, such as sex or race. The *Canadian Human Rights Act* contains 11 prohibited grounds.

In contrast, s. 15 of the *Canadian Charter of Rights and Freedoms* which entrenches constitutional equality rights, prohibits discrimination generally, and then specifically enumerates seven prohibited grounds. A general prohibition is typically referred to as an "open-ended clause" because the impugned grounds of discrimination are not closed. It needs criteria for determining whether a particular exclusion or negative treatment comes within its prohibition. For s. 15, the Supreme Court has developed an "analogous ground" approach, which requires that a ground of discrimination be analogous to an enumerated one before it is included under the open-ended clause.

This project asks whether an open-ended list of grounds in the CHRA would advance women's equality more effectively than the existing approach of a closed list. First, it describes important features of the CHRA and the Charter, and examines the relationship between the human rights statute and the constitutional text. Then it describes and evaluates several versions of an open-ended clause that could be incorporated into the CHRA.

- The CHRA could prohibit discrimination "without reasonable cause," a broad provision which would prohibit any unreasonableness regardless of whether the differential treatment or exclusion was related to stereotypes or prejudice about group membership. From 1973 to 1984, the British Columbia human rights legislation contained a provision of this breadth. The report rejects this approach, in part because of its assumption that any distinction constitutes an equality violation, which would detract considerably from women's equality struggles.

- The CHRA could prohibit any form of discrimination based on stereotypes about group membership, regardless of whether the group meets the criteria for "analogous" established by the Supreme Court. The report examines current Manitoba legislation that contains a "group membership" provision to this effect, and concludes that this option would likely lead to an analogous ground approach.

- In line with the Supreme Court's s. 15 approach, the CHRA could mirror the Charter by prohibiting discrimination on the basis of both enumerated and analogous grounds. The report discusses this option at length, considering six arguments that support or oppose the change. While a mirror provision could ensure the CHRA responds to new developments under the Charter, it would also produce negative consequences. It would reinforce the prohibited grounds approach to resolving inequalities. It could divert resources from the political process, and would likely constitute an inefficient use of administrative resources. Furthermore, it could constrict statutory human rights law, of

which the CHRA is an important element, into the more narrow confines of constitutional equality rights.

The report concludes that an open-ended clause does not produce sufficient benefits to justify adding it to the CHRA. Specifically, it would not effectively address economic inequalities experienced by women.

1. THE CURRENT CONTEXT

The *Canadian Human Rights Act*

First enacted in 1978, the *Canadian Human Rights Act* (CHRA) is an important policy tool and symbolic statement of Canada's commitment to equality. It contains 11 prohibited grounds of discrimination: race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for which a pardon has been granted. These grounds are listed in s. 3 of the Act. With application to women across the country, the CHRA establishes human rights standards for the federal government and for all federally regulated businesses. The latter includes major employers, such as banks, railways and telecommunications corporations. Moreover, the CHRA's content and interpretation influence provincial developments that pertain to women's equality.

The CHRA is a statute. It can be amended by ordinary legislative process, which means Parliament may amend it by a simple majority vote of its members. However, since its original enactment in 1978, the CHRA has been amended infrequently. Many proposed changes have been controversial, and governments have been unwilling to risk further controversy by introducing amendments. The government's reluctance during the 1980s to add sexual orientation to the list of prohibited grounds delayed passage of other pressing amendments, such as an explicit incorporation of the duty to accommodate.

The Supreme Court of Canada has called the CHRA and provincial human rights laws "quasi-constitutional" because they articulate fundamental values and incorporate basic societal goals. Beginning with *Heerspink* v. *I.C.B.C.* in 1982, the Court has given human rights laws a broad and generous interpretation, one consistent with their purpose: remedying discrimination and providing "the final refuge of the disadvantaged and disenfranchised" (*Zurich Insurance Co.* v. *Ontario* 1992: 339). However, the Court has not consistently applied this interpretative principle, rejecting purposive interpretations which commissions and tribunals had developed to remedy the systemic exclusion of gay and lesbians families from employment benefits (*Mossop* v. *A.-G. Canada* 1993) and the erasure of women's contributions to history (*Gould* v. *Yukon Order of Pioneers* 1996).

Women who wish to obtain redress under the CHRA for inequalities must meet two preliminary conditions.

- They must experience inequality in an area of activity covered by the CHRA, such as employment or services that are federally regulated.

- They must show that their inequality fits into the description of one of the prohibited grounds. For instance, they may show that the inequality arises because of their sex or race. This may be done by proving that a decision maker deliberately used a prohibited ground as a reason to deny equal treatment (intentional discrimination). Alternatively, claimants may prove that an ostensibly neutral policy has a disproportionate effect on a group defined by a prohibited ground, such as by sex or race (adverse effects

discrimination). The concept of discrimination has developed in such a way that all claims under the CHRA require a causal connection between the inequality and at least one prohibited ground.

In many circumstances, the prohibited grounds offer several avenues for filing a complaint of discrimination. Consider the example of a community organization that wishes to challenge a landlord's policy of not renting apartments to lone parents. The policy could be challenged directly as discrimination on the basis of family status, since people with children are suffering a disadvantage. It could also be challenged as discrimination on the grounds of marital status because it denies accommodation to parents who are not in marital relationships, whether legal or common law. Both of these challenges are examples of intentional discrimination. Alternatively, because the majority of lone parents are women, the policy's disproportionate impact on women could be challenged as sex discrimination. Depending on the city's demography, the policy may also have a disproportionate effect on women of a particular ethnic origin or ancestry.

However, in many other circumstances of inequality, the prohibited grounds do not facilitate the filing of complaints as a method of redressing the inequality. In some cases, it may be impossible to correlate the systemic negative treatment with a prohibited ground. Even more problematic are inequalities involving numerous and systemic causes, such as the negative treatment of people without homes or the denial of employment benefits and job security to part-time workers.

Even if women meet the two preconditions for possible redress under the CHRA, many obstacles may come between women and a remedy. They must initiate a claim with the Canadian Human Rights Commission (CHRC). The claim, which is given the pejorative label of "complaint," enters the Commission's investigative process, although it may be settled informally by the CHRC's early resolution process. If not, it proceeds to investigation. When staff complete the investigation, the Commission decides whether to send the complaint to the Canadian Human Rights Tribunal for adjudication. The process is lengthy and often alienating. The Commission's resources have not kept pace with demand for its services, and investigations rarely begin immediately. Funding cuts have led to severe cutbacks of regional offices, which further distance the CHRC staff from regional and local women's organizations. Instead of a regional office that engages in investigation and public education, with linkages to community organizations, the regional office is now one or two people who cannot have an effective presence in the entire region. In addition, procedures have become increasingly formal as respondents have challenged the decision-making process in the federal courts. A combination of factors, from the flood of individual claims to legalistic procedures, has detracted from the CHRC's ability to deal efficiently with complaints (Witelson 1999: 160-175).

This project does not focus on the overall effectiveness of the current commission structure for promoting women's equality. However, it is safe to say that the CHRA has contributed to the general advancement of women's equality, but not as quickly or thoroughly as many women, and their organizations would like. The individual complaint process does not lend itself well to promoting systemic change. While sometimes it may, as with the *Action*

Travail des Femmes v. *C.N.R.* decision (1987), more often it deals only with the circumstances of one person, or a group of people, in one workplace. When the complaint process does deal with large numbers and general policies, the sheer size and importance of the issues quickly bog it down. The pay equity complaints, although not part of this review, are an excellent example of the inefficiencies of the complaint process (Handman and Jensen 1999: 73-81).

Section 15 of the Charter

Section 15 of the Charter is the primary equality provision in the Constitution. Two specific provisions of the *Constitution Act, 1982*, also guarantee sex equality—ss. 28 and 35(4). However, counsel and courts have ignored both guarantees. While s. 28's immunity from the s. 33 override and possibly s. 1's reasonable limits could have been used to assert that sex equality is the most important aspirational goal of the Charter, the courts have not given it this interpretation. Section 35(4), inserted as a result of the 1983 constitutional conference on Aboriginal issues, was designed to eliminate discrimination against Aboriginal women. It has been virtually ignored. For instance, the Supreme Court did not mention it in *Corbière* v. *Canada* (1999) even though the impugned law had a much greater impact on women because of sex discrimination in the old *Indian Act*. Thus, s. 15 remains the principal constitutional vehicle for promoting women's equality. Appendix A contains s. 15 and other constitutional provisions that are relevant to this report.

Section 15 declares that everyone has a right to equality without discrimination. It then lists seven grounds of prohibited discrimination: race, national or ethnic origin, colour, religion, sex, age and disability. Section 1 permits violations of s. 15 to be justified as reasonable limits on equality rights. In the Charter's early days, several commentators argued that because s. 15 did not limit discrimination to prohibited grounds, it was violated by any distinction in a law or governmental policy, with the distinction requiring s. 1 justification (Hogg 1985: 800). This approach attracted many critics, who were fearful of wholesale invalidation of laws.

Since almost every law or policy draws distinctions on some basis, interpreting discrimination to require nothing more than a distinction would open the courtroom door to challenges of every law as violating s. 15. This would place enormous power in the courts. Moreover, it is inconsistent with the understanding of human rights laws as involving remedies for prejudice, stereotypes and historical disadvantage.

In its first s. 15 case, *Andrews* v. *Law Society of B.C.* (1989), the Supreme Court rejected decisively the "distinction" approach. Concerned with the potentially far-reaching and negative impact of the approach, the Court restricted the open-ended clause to grounds of discrimination that are analogous to the enumerated grounds. Under this approach, a court examines the listed or enumerated grounds to determine their shared features, and then compares the examined grounds to the new ground to see if it possesses at least some of the commonalities. The enumerated or analogous grounds approach substantially reduces the potential sweep of s. 15, but is more consistent with the historical purpose of human rights legislation.

Since *Andrews*, the Supreme Court has added several analogous grounds, including ones of benefit to specific groups of women. See the addition of marital status (*Miron* v. *Trudel*, 1995); sexual orientation (*Egan* v. *Canada*, 1995); and off-reserve band member status (*Corbière* v. *Canada*, 1999). In doing so, it has articulated with greater precision the factors to consider in determining whether a ground is analogous. The most recent decision, *Corbière*, is part of a 1999 trilogy of equality cases in which the Court reaffirms and refines its basic *Andrews* approach. A majority of the Court in *Corbière* stated that the central characteristic of an analogous ground is a personal characteristic that is either immutable or changeable only at unacceptable cost to personal identity. Factors such as historical discrimination against the group, or their discreteness and insularity, are seen to flow from this central concept of immutable characteristics (*Corbière* v. *Canada* 1999: ¶13).

The application of the analogous grounds approach has not assisted groups defined by their economic inequality. For instance, agricultural workers are not an analogous group because they are heterogeneous; occupational status alone is insufficient to constitute an analogous group (*Dunmore* v. *Ontario (A.-G.)* 1997). In the same manner, social assistance recipients are too disparate and heterogeneous to meet the criteria for an analogous group (*Masse* v. *Ontario* 1996), although an early trial court decision held otherwise (*Federated Anti-Poverty Groups of B.C.* v. *B.C. (A.-G.)* 1991). Neither are poor prisoners, because "the economic situation of a group of people does not constitute a ground relating to a personal characteristic" (*Alcorn* v. *Canada* 1999: ¶ 85).

Comparison of the CHRA and the Charter

There are several important differences between the CHRA and s. 15 of the Charter. First, the Charter is an entrenched constitutional document, while the CHRA is a statute. This difference cannot be overemphasized, and has several important consequences. Because the Charter is entrenched, it is much more difficult to amend. Any change to s. 15 needs the approval not merely of Parliament, but of seven of 10 provinces representing over 50 percent of the population. Since the *Constitution Act, 1982*, took effect, there have been no changes to the Charter as a whole, let alone s. 15. The difficulty of amendment was one primary reason for including an open-ended provision in s. 15 because it would permit judicial modifications to the scope of equality rights. By comparison, amendments to the CHRA need only obtain the approval of a majority of voting members in Parliament.

Another consequence of the Charter's constitutional status is that, as part of the supreme law of the land, all other laws must be consistent with it. The CHRA, as an ordinary statute, cannot violate the Charter. Thus, Parliament would be acting unconstitutionally if it enacted a law that directly violates the Charter, such as one imposing a state religion on all citizens. With respect to the CHRA, Parliament cannot enact an amendment in violation of either s. 15 or any other right or freedom. For instance, a law that sets a different minimum wage for women and men would clearly violate the Charter's equality rights.

The Supreme Court has held that a human rights law may violate the Charter if it does not cover a ground that is within s. 15's enumerated or analogous list. In *Vriend* v. *Alberta* (1998), the Court added "sexual orientation," an analogous ground in s. 15, to the list of

prohibited grounds in the Alberta human rights law. The Alberta Legislature did not change the Alberta human rights law to add sexual orientation as a prohibited ground, after most provinces had done so in their legislation, and the Court had already held in the earlier *Egan* decision that sexual orientation was an analogous ground. In that context, the Court held that excluding gay men and lesbians from the protection of the Alberta law violated s. 15, and it read "sexual orientation" into the statute's list of prohibited grounds.

Vriend shows that changes to human rights statutes will not be made only by Parliament. The courts can require revision of the CHRA to ensure conformity with constitutional dictates. Whether all anti-discrimination laws, including the CHRA, will need to mirror the analogous grounds in the Charter is discussed in Chapter 3 of this report.

Second, the Charter only covers governmental action, but not action in the private sector. How to distinguish public action from its private counterpart is often controversial, but courts draw the line and exclude from constitutional scrutiny discrimination engaged in by private actors, such as business corporations. In contrast, the CHRA, like its provincial counterparts, covers a broad range of activities engaged in by both governments and private actors. It can have whatever coverage Parliament decides to give it, subject to the limitations of federalism.

Third, the rights in s. 15 of the Charter are subject to the general limitation clause in s. 1, which permits reasonable limits that are prescribed by law. The CHRA does not have a general limitation clause available to justify every violation of the statutory rights. Rather, it contains a number of specific exemptions, exceptions and qualifications to the prohibitions on discrimination. However, there is nothing inherent in a statutory code that precludes adding a general limitation clause. For instance, s. 11.1 of the *Alberta Human Rights, Citizenship and Multiculturalism Act* contains a general justification for violations.

Fourth, courts are the primary enforcement agency for Charter rights. Sections 24 and 52 of the *Constitution Act, 1982*, contemplate courts as the remedial forum for Charter claims. While some administrative tribunals do have the power to enforce Charter rights, the courts jealously guard their authority over Charter rights and remedies, and adjudicate the vast majority of Charter issues. In contrast, the CHRA establishes the Canadian Human Rights Commission and Tribunal as the initial enforcement mechanism for violations of the Act. Indeed, since the Supreme Court decision in *Bhadauria* v. *Seneca College* (1981), individuals and groups cannot bring actions in court to enforce rights in the CHRA. The exclusive process for protection of these rights is the filing of a complaint with the Commission, which will be adjudicated at first instance by a specialized tribunal, the Canadian Human Rights Tribunal. The ordinary courts only become involved with human rights adjudication under the CHRA or provincial legislation if the laws themselves permit an appeal, or if the courts exercise the more limited power of judicial review.

However, the courts have the ultimate authority in the interpretation of the CHRA. When they hear appeals or review applications, they give authoritative interpretations of the provisions. Since their interpretation is final, they can change the scope and meaning of statutory provisions. For instance, they can disagree with a commission about whether gay

and lesbian families are included within the ground of family status (*Mossop* v. *Canada* 1993). Or, they can endorse commission and tribunal interpretations, such as the decision affirming that sexual harassment is a form of sex discrimination (*Janzen* v. *Platy Enterprises Ltd,* 1989).

But the influence is not completely one-sided. The wording of human rights codes and the interpretative principles developed by commissions and tribunals have influenced the content and interpretation of s. 15 (*Andrews* 1989: 175). The CHRA and other codes have been a source of guidance and inspiration for giving meaning to s. 15. For instance, the Supreme Court looks at whether a ground is included in human rights statutes across the country as an indication of whether it ought to be an analogous ground (*Egan* v. *Canada* 1995: 675; *Miron* v. *Trudel* 1995: 748).

It is important to keep in mind that one impetus for creating commissions and specialized tribunals was the unsympathetic stance of the ordinary courts to claims of discrimination. Legislatures created commissions and tribunals to provide more effective redress for rights violations. Legislatures have taken the lead in amending and passing laws to promote equality, including adding new grounds of prohibited discrimination, such as sexual orientation, and, in many provinces, receipt of public assistance. It has been legislative creations—commissions led by community organizations, unions and women's groups—which have implemented some of the most progressive interpretations of human rights laws. Two examples include the acceptance of sexual harassment and pregnancy discrimination as impermissible forms of sex discrimination. The courts endorsed these developments; they did not initiate them.

This report assumes that in the foreseeable future the Charter will not be amended, nor will the Court's interpretation of s. 15 change dramatically. With respect to the CHRA, since its revision is the impetus of this research, one cannot assume that its scope and administrative structure will remain unchanged. However, one must keep in mind that any change to the substantive scope of the CHRA will impact the Commission and the Tribunal.

2. OPEN-ENDED CLAUSES IN HUMAN RIGHTS LEGISLATION

Options for the CHRA

In assessing the likely contribution of an open-ended list to women's equality, we asked the following specific questions.

- Would the proposal enhance the CHRA's capacity to ameliorate persistent patterns of inequality that it has addressed since its inception, such as sexual harassment in the workplace and pay inequities?

- Would the proposal ameliorate persistent patterns of inequality that have not been addressed by anti-discrimination legislation? We choose poverty as our example of a persistent pattern of inequality. Specifically, would an open-ended clause assist women in challenging policies and decisions that have a negative impact on poor women?

- Would the proposal provide more accessible avenues of redress for inequalities suffered by individual women or by particular groups of women?

There are several methods of adding an open-ended clause to the CHRA. Each would facilitate a greater number of possible claims under the CHRA. The first is an analogous grounds approach, which is the narrowest change. The second is a middle approach. The third is an unreasonable cause approach, which is the broadest, with the largest number of actions that can be potentially challenged as discrimination. Appendix B contains draft statutory language for each option.

Analogous Ground Approach
Change the wording of the CHRA in such a way that it mirrors the wording of s. 15 of the Charter. This result could be achieved by inserting the Charter's open-ended wording into relevant sections of a new CHRA. If the current structure of the CHRA was retained, the list of prohibited grounds in s. 3 could be redrafted to replicate the Charter wording. The substantive provisions, such as s. 7 that prohibits discrimination in employment, could be left unchanged. Alternatively, the entire CHRA could be recast in positive language that gives everyone a right to equality, which is the current Ontario model. The positive right could then be worded in the same way as s. 15. Both variations are contained in Appendix B.

Group Membership Approach
Include a definition of discrimination that makes no mention of prohibited grounds, but does restrict discrimination to an individual's actual or presumed membership in a group. The option would not permit any claim of individual unfairness, but would be broader than the analogous ground approach under s. 15. This is the approach currently contained in the *Manitoba Human Rights Code.*

Unreasonable Cause Approach

Define discrimination as any distinction or denial to a person or class of persons that cannot be supported on reasonable grounds, and then exclude a number of grounds as unreasonable, such as sex, race and religion. In essence, any distinction would constitute discrimination unless reasonable cause existed for the distinction. Membership in a group defined by a personal characteristic, or subjected to stereotyping or historical disadvantage, would not be an essential feature. This approach was in effect from 1973 to 1984 in British Columbia, and is akin to the any distinction approach rejected by the Supreme Court for s. 15 claims.

An Unreasonable Cause Provision: The B.C. Experience

From 1973 to 1984, human rights legislation in British Columbia prohibited discrimination "without reasonable cause." Appendix C contains a description of the British Columbia experience, most of which occurred before enactment of the Charter, and all of it before s. 15 took effect in 1985. Thus, the Commission's handling of the clause was not influenced by the analogous ground approach developed by the courts under s. 15.

Initially, the B.C. Commission interpreted the without reasonable cause provision very broadly, not restricting it to circumstances that were analogous to the enumerated grounds in the Code. However, the Commission, and boards of inquiry that heard the complaints, gradually developed an analogous ground approach.

The historical record clearly indicates that controversy about the Commission's application of the open-ended clause led to political backlash, and contributed to the demise of the Commission and the Code. The British Columbia Legislature abolished the Commission in 1984, and replaced the Code with a modest *Human Rights Act* (1984) which did not contain the without reasonable cause provision.

The B.C. experiment offers several insights for those considering the future shape of the list of grounds in the CHRA.

- The provision gave the commission and boards of inquiry a powerful tool to advance the development of human rights law. Long before appearing in the closed lists of other jurisdictions' human rights acts, grounds such as sexual orientation, criminal charge, pregnancy and disability were protected under the without reasonable cause provision.

- The provision caught incidents of discrimination that, even today, would still be outside the protection of closed-list provisions. For example, in spite of the fact that they were denied service because of stereotypes, the complainants in *Oram and MacLaren* (1975) would have difficulty today arguing that their appearance falls under any enumerated ground.

However, the B.C. experience also points out considerable weaknesses with an unreasonable cause approach.

- One problem that emerged early on was that the provision could easily turn into a catch-all for general unfairness, one that would catch a very large number of actions, many

only marginally significant. For example, the *Lopetrone* case (1976), which concerned whether the employer had properly assessed individual merit, pushed the limits of what reasonably should be protected by anti-discrimination legislation, and bordered on plunging the Commission into adjudicating fairness in employer decision making. However, the Commission and boards recognized the undesirable potential of this approach, leading the board in *Jefferson* v. *Baldwin and B.C. Ferries* (1976) to adopt "categories" or analogous ground-type reasoning, which eliminated many claims. As well, the legislative creation, in 1979, of the provincial Office of the Ombudsman, with its mandate of addressing unfairness complaints against government, diverted some pressure on the Commission to respond to situations of unfairness.

- The without reasonable cause provision did little to address the problems of those who suffered discrimination on grounds subsumed by the phrase "social condition." Indeed, while the Commission received a few complaints on the grounds of source of income, family status, financial status and educational requirement, none of these ever made it to a board of inquiry. It is unclear why this is so. Perhaps the Commission was so swamped by the large number of claims on other grounds that social condition assumed low priority. It may also be that the Commission, in the spirit of the times, considered social condition to be a non-ground. But this is speculation; in this case anyway, an open-ended clause did not extend to social condition.

- Although one would think that the without reasonable cause provision would encourage boards and courts to consider multiple grounds and intersectionality in adjudicating complaints, there is no evidence that this, in fact, took place.

- While the without reasonable cause provision did promote progressive development of human rights law, some of this development was well ahead of the community consensus needed to sustain it. While it may be tempting to dismiss the repeal of the Code and abolition of the Commission as isolated acts of an especially hostile right-wing government, a significant proportion of B.C. society supported those actions. As a result, the clock was turned back, with some groups that suffer discrimination losing protection that would only be restored nearly 10 years later.

- Even though many of the grounds the B.C. Commission dealt with are now enumerated ones, one likely consequence of adding an unreasonable cause provision to the CHRA is that the CHRC would be swamped by complaints. A large number of aggrieved persons would file complaints with the Commission because there is no federal ombuds office to deal with instances of governmental unfairness in its dealings with individuals.

We conclude that adding such a ground to the CHRA is undesirable. It is akin to the "any distinction" approach to s. 15 of the Charter, and would produce a similar result of potentially requiring a reasonable justification for every action or decision in the public and private sectors. While, in the abstract, a requirement of reasonableness may seem harmless, in practice it presents many difficulties. It would likely do nothing to address persistent patterns of inequalities, and would divert resources and attention from important issues. It would render the current system more inaccessible, merely because of the large number of

complaints that could be expected. The option falls short on each of the criteria of assessing a proposal's effectiveness in addressing women's inequalities.

A Group Membership Approach: The Manitoba Experience

The *Manitoba Human Rights Code* contains an open-ended definition of discrimination. Appendix D reproduces the statutory provision, s. 9(1)(a), and describes in more detail the Manitoba experience. The number of claims has always been very small, and in the past few years, most have involved discrimination on the basis of criminal record. The Commission does not apparently engage in any publicity about the clause and its possible uses.

The Manitoba Commission has adopted a cautious approach to the unspecified grounds provision. In the words of one official, the Commission does not see itself as an "unfairness commission" that deals with any and all forms of injustice. It directs its resources toward dealing with discrimination based on the enumerated grounds. However, its policy is not quite as restrictive as the analogous grounds approach under the Charter. To come within an "unspecified ground," a person need only meet the condition of proving "differential treatment which is based on a stereotypical view of a group of persons" (Manitoba Human Rights Commission 1987). By contrast, the Supreme Court's approach to s. 15 includes stereotypes as merely one factor, and not the critical determinant, in assessing whether an unenumerated ground will become an analogous one (*Corbière* v. *Canada*, 1999: ¶ 59-62).

If a version of s. 9(1)(a) were added to the CHRA, the Manitoba experience would likely not be replicated at the federal level. For one thing, the CHRC would likely face enormous pressure, especially from large corporations, to use analogous grounds reasoning from the beginning. The Manitoba Commission issued its policy before the Supreme Court had developed criteria for analogous grounds under s. 15. Moreover, the CHRC would likely receive more complaints than its Manitoba counterpart, which does not publicize the availability of an unspecified ground. Merely adding an open-ended clause to the CHRA would, in itself, generate considerable publicity. Even if it did not, national organizations and unions would be aware of the unspecified ground and would test its content and limits by filing complaints. With the tendency of several federally regulated employers to seek judicial review of commission decisions, one can reasonably expect litigation. The combination of a large number of complaints, litigation and judicial review would likely produce criteria similar to the Court's analogous grounds approach, if only to provide some certainty for the private sector.

If this supposition is correct, and a Manitoba-style provision would become a non-constitutional version of analogous ground, then the arguments in Chapter 3 of this report would apply. If, on the other hand, it remains broader than the analogous grounds approach, then it may be used to advance women's equality in ways that extend beyond constitutional understandings of equality. For instance, the Commission and Tribunal could recognize negative treatment of part-time workers as a prohibited form of group-based discrimination. Many problems would remain, however, such as employer uncertainty about the extent of their obligations, which cannot be easily addressed by policy statements.

3. ANALYSIS OF AN ANALOGOUS GROUND PROVISION IN THE CHRA

The preceding two sections have discussed two of the three options. The unreasonable cause approach has been rejected because of its limited utility in addressing women's inequality. The group membership approach may offer more possibilities, but may lead to an analogous ground approach. The remaining alternative is the analogous grounds approach itself, in which the CHRA would replicate the open-ended ground in the Charter. However, putting the s. 15 words into the CHRA would not, in itself, produce the same criteria that the Supreme Court has developed for constitutional cases. Unless the amendment also stated specifically that its clear intention was to incorporate the s. 15 jurisprudence, the Commission and Tribunal would have scope for extending protection beyond the boundaries of s. 15, merely because the differences between the Charter and the CHRA could justify different criteria. Departing from the s. 15 criteria could produce the same results as the group membership approach discussed above.

This section addresses merits and disadvantages of having an open-ended clause in the CHRA, either one that exactly replicates the constitutional criteria for an analogous ground or something a bit different. It assesses the likelihood that any interpretation of a mirror provision would depart from the Court's interpretation of s. 15.

Responding to New Developments

Open-ended provisions are frequently advocated because they accommodate future developments. In the constitutional negotiations leading up to the Charter's enactment, the primary argument in support of an open-ended clause in s. 15 was the need for equality guarantees to respond to changing circumstances. Constitutions endure for a long time, and are not easily changed. The open-ended clause would permit the constitutional guarantees of equality to respond to inequalities that could not be foreseen in 1982. A similar argument can be made with respect to the CHRA. An analogous ground provision would permit commissions and tribunals to incorporate new developments in human rights protection, without the necessity of seeking amendments to the Act. While amending the CHRA only requires the ordinary legislative process, busy legislative agendas and other factors have combined to make amendment of the CHRA an infrequent occurrence.

Adding an open-ended clause would remove the argument that Parliament does not intend commissions and tribunals to interpret the CHRA in an expansive manner that keeps pace with understandings of equality. Indeed, the argument would be the reverse. By including an open-ended clause, Parliament intends commissions and tribunals to address inequalities that arise in new ways—ones that were not contemplated by Parliament at the time of enactment.

With an analogous ground provision, the CHRC could return to its roots as an agent of social change. It could address new problems and, as the B.C. experience illustrates, act as a catalyst for social justice. However, the Manitoba experience shows that there is no guarantee this will happen. Much depends on the resources of the CHRC, and the political backing it receives for its efforts. Moreover, if the Commission adopts the s. 15 criteria for

analogous grounds, its ability to respond to new injustices would be restricted, at least in part or initially, by the Court's jurisprudence.

The extent to which an analogous ground provision in the CHRA would permit flexibility and innovation depends, in large part, on whether commissions and tribunals would use it to argue for analogous grounds that were *not* covered by the Charter. If they did, then the CHRA's analogous ground could prohibit different forms of discrimination. These new grounds could be slowly incorporated into the Charter, continuing the symbiotic relationship between statutory codes and s. 15. Otherwise, the CHRA simply becomes another s. 15, interpreted and controlled by the courts, but with application to the private sector.

Women also need to be concerned, however, with not only how well an analogous ground provision would respond to new developments, but also how well it will respond to old and persistent inequalities. An analogous ground provision in the CHRA does not appear to do very much for women who live in poverty, at least not immediately. If receipt of social assistance does not qualify as an analogous ground under the Charter, then it will be a long, expensive and risky battle to have poverty recognized as an analogous ground under the CHRA.

Avoiding an Unconstitutional Gap

One argument in support of a mirror provision in the CHRA is that the Charter itself compels this result. Because the CHRA cannot violate the Charter, any discrepancy in coverage between the Charter and the CHRA would be unconstitutional, and the courts would read into the CHRA the absent ground, as occurred with sexual orientation in *Vriend* v. *Alberta* (1998). Over time, the CHRA would come to mirror the Charter in any event, so it might as well be done now to avoid expensive litigation. Adding an open-ended provision will ensure that any new Charter analogous ground will be automatically included within the CHRA, without the need for expensive litigation.

This argument has been recently advanced in support of changing a provincial human rights law. In his 1994 report on human rights legislation in British Columbia, Professor Bill Black argues that a human rights code should incorporate analogous grounds in order to ensure conformity with s. 15 of the Charter (*Report on Human Rights in British Columbia*, 1994: 163). He points out that no one can identify with certainty the grounds the courts will include as analogous in s. 15 of the Charter. From this uncontestable fact he concludes:

> The surest way to avoid an unconstitutional gap in the Human Rights Code would be for the Code to be worded in a way that recognized analogous grounds. The Human Rights Tribunal, taking guidance from the courts, could then interpret the Code in a manner consistent with the equality guarantees in the Charter.

Black recommends identical wording in the statute in order to "signal to the courts an intent to adopt the approach taken in the Charter." Presumably, once the courts find an analogous ground, it would come within the CHRA as well, and would then apply to the private sector.

For instance, a private actor could no longer use citizenship or off-reserve residency as a reason to differentiate between customers. Even if Parliament falls far behind in amending the CHRA to take account of new human rights developments, the analogous ground provision would ensure that statutory human rights protection would be at least consistent with Charter standards.

Assessing the merit of this argument requires close scrutiny of its underlying assumptions. First, it assumes that the omission of an analogous ground in a code, or in our case the CHRA, would be unconstitutional. That is not invariably, or even frequently, the case. In only one case has the Supreme Court ruled that the omission of an analogous ground—sexual orientation—from a human rights law violated s. 15 of the Charter (*Vriend* v. *Alberta*, 1998). The Court explicitly rejected the argument that human rights legislation would be forced to mirror the Charter in all cases. "Whether an omission [from a human rights code] is unconstitutional must be assessed in each case, taking into account the nature of the exclusion, the type of legislation, and the context in which it was enacted" (1998: ¶ 106). Unconstitutionality is not a mechanical determination that merely involves checking to see if a statute mirrors the Charter, but depends on many factors.

In their assessment of unconstitutionality, the courts will be sensitive to the fact that the Charter is addressed to government action, while human rights law covers both the public and the private sector. Adding a new analogous ground to human rights codes will have potentially far-reaching consequences in the private sector. Section 1 is available to the government, but there is, at the moment, no equivalent provision in the CHRA. One would think that if there was a mirror provision, a s. 1 would need to be added, perhaps something akin to the "reasonable and justifiable contravention" provision in s. 11.1 of the Alberta legislation.

One can reasonably surmise that the courts will be extremely cautious about requiring that every new analogous ground in s. 15 be added to the CHRA. If it did so, then the s. 15 guarantees of equality would no longer be restricted to the public sector, as the court has held generally with respect to the Charter. Rather, everything in s. 15 would apply, through the medium of the CHRA, to the private sector. It is permissible, of course, for Parliament to expand the obligations people owe each other in the private sector. But the court will not lightly apply constitutional standards to private actors. Indeed, a mirror provision in the CHRA might make the courts more cautious about finding analogous grounds in s. 15, for fear of their automatic transplantation to the private sector.

Reinforcing the Prohibited Ground Approach

An open-ended list may reinforce the belief that the prohibited ground approach is the best way of addressing inequality problems. The mere existence of an open-ended clause may lead to the framing of inequality problems in the language of prohibited grounds. For instance, one could argue that part-time employment status is a prohibited ground, and file a complaint that the differential treatment of part-time workers by corporations violates the CHRA.

Reality is that the complaint system is almost certainly not the best method of redressing the inequalities suffered by part-time workers. Regulatory changes to labour standards legislation would do more good, over a much shorter period of time. Overall, a regulatory model has many advantages over a complaint system for the promotion of women's equality. The essence of a regulatory model is to place positive obligations on employers or service providers to take certain measures or engage in particular conduct. One successful example of a regulatory approach to equality is the uniform building accessibility standard. Builders only receive building permits if they comply with the accessibility standards. While the standard is not comprehensive, and has not been perfectly applied, it has had a much faster and more widespread impact on building accessibility than even the most efficient complaint system could ever muster. Other examples of regulatory models include the federal *Employment Equity Act*, which requires all large federally regulated employers to develop equity plans, and the Ontario *Pay Equity Act*, which requires all employers to implement pay equity.

An analogous ground provision, of course, would not preclude the creation of regulatory methods to combat systemic forms of inequalities. However, the concern is that an open-ended clause would further privilege this approach as a strategy for addressing inequalities, when it does not deserve to be so. Regulatory methods can deal with the problem of multiple causes of inequalities. One significant limitation on a prohibited grounds approach is that it requires an identifiable actor—a wrongdoer who engaged in the discriminatory conduct. Yet many inequalities result from the combined actions and omissions of many institutions and individuals.

Reinforcement of the prohibited grounds approach may only exacerbate the deep-rooted tendency of courts and commissions to downplay the phenomenon of intersecting grounds. Iyer has pointed out how a "listed grounds" approach tends to force women to categorize their experiences as being either race discrimination or sex discrimination or some other form of discrimination. It does not permit women who suffer discrimination on a number of grounds, simultaneously, to have their experience reflected in the case law or in analytical methods (Iyer 1993).

One would think that an open-ended clause would assist women who suffer inequality on a number of grounds. They would not need to slot their experiences into one category, but could simply argue discrimination. However, the mere existence of a list of prohibited grounds seems to pull commissions and courts into a mind set that focusses on a singular characteristic, rather than a number of them, or the results of combining a number of them. For instance, both the Manitoba Commission, and the old B.C. experience, failed to use the open-ended clause in this way, focussing instead on a group characteristic (singular) rather than characteristics (plural).

Diverting Resources from the Political Process

The potential availability of new grounds under an analogous ground provision may divert women's efforts to reform social and economic policy away from the political process, where success typically produces structural and more far-reaching changes. Using the

complaint process, on the other hand, even if it is a bit more expansive because of an analogous grounds approach, typically produces ad hoc changes to isolated policies. Over time, the complaint process may have a systemic effect, but it always takes longer to generate widespread change. One need only look to the example of ending discrimination against women in hiring and promotion. Employment equity legislation achieves that goal much faster than even the most efficient complaint process.

Legislatures not only have the power to introduce regulatory systems for achieving equality. They also can ensure that the CHRA is kept up to date. Historically, the political process, on balance, has been more progressive than the courts. For instance, the first recognition of sexual orientation as a prohibited ground did not come from courts, but from the Quebec National Assembly, which added sexual orientation as a prohibited ground to its human rights law in 1977 (*Charter of Human Rights and Freedoms*). Commissions took complaints of sexual orientation, and brought the injustice of this form of discrimination to the public eye. However, this is not to say that legislatures have always been at the forefront of human rights development. One need only remember the Alberta government's dogged refusal to add sexual orientation to its human rights law. These highly publicized examples detract from the larger picture—changes to human rights have been led by legislatures, not by courts.

These concerns replicate the concerns that many women's groups had with passage of the Charter in 1982.

An open-ended clause may make Parliament even less willing to engage in changes to the CHRA. Legislators who do not wish to respond to demands from community groups may say that change can come through the tribunal and court process, by a group arguing discrimination under the open-ended ground. Parliament may be prepared to respond to negative court decisions (as it did with the multiple grounds provision, s. 3.1 of the CHRA, which responded to *Mossop*) but may be less inclined to take a proactive role in implementing new directions in human rights law. Politicians can wash their hands of the responsibility for change by pointing to the open-ended ground—"make your argument to the commission and courts" may be their response.

Even if Parliament has the desire to change the CHRA or introduce other legislation to correct inequalities, a mirror provision in the CHRA may lead it to believe it can only make changes consistent with the courts' approach to analogous grounds. For instance, perhaps one argument for not proceeding with protection for people who are homeless would be that they are not an analogous group. The argument would be that they are not one of the groups that human rights laws, including s. 15, traditionally protect. Overall, there is a risk that the more the CHRA looks like the Charter, the less amenable it will be to progressive interpretations and amendments. It will become a Holy Grail, untouchable and unchangeable.

Legislative changes are not easy. They require political will and a momentum for change that must be built by lengthy political campaigns involving education, media relations and negotiation. When an amendment is finally passed, often with strong and vocal opposition,

the government and other key players may not be committed to its full implementation. And, legislation may become highly unpopular (as with the old B.C. unreasonable cause provision) and be reversed. Moreover, to emphasize the role of legislatures in protecting rights may seem antithetical to the core concept of human rights as protections of minorities from oppressive treatment by majorities. After all, rights are entrenched, and placed above the ordinary political fray, to lessen the impact of politics on fundamental values. And, court decisions can become widely accepted and assist in building a consensus. None of these facts, however, detracts from the two points we argued above. First, legislatures have done more to promote social justice and women's equality than courts. Second, adding an analogous ground provision will have consequences for the political process, which women must consider in deciding whether to advocate for it.

Inefficiently Using Commission Resources

Whether or not a mirror provision in the CHRA would have a serious impact on the allocation of CHRC resources depends very much on the Commission's policies regarding the types of complaints it will accept and argue before a tribunal. If it decides to interpret the provision broadly, and depart from the Court's narrow criteria for an analogous ground, it will need to direct resources toward a larger number of complaints. Not all of the complaints that will be received under an analogous ground provision will deal with women's equality concerns. The resources will be directed toward other grounds or injustices that do not affect women directly or that support more advantaged groups in society. As well, resources will almost certainly need to be directed toward litigation because, in significant issues, the question of a new open-ended ground will end up in the Supreme Court. At the end of the day, fewer resources will be devoted toward the existing inequalities that the CHRA has always addressed, such as sexual harassment in the workplace and pregnancy discrimination.

It is not a complete answer to this problem to say that the commission's budget should be increased. Its resources will always be limited, and the complaint process will always expand to take up available resources. Every commission makes priorities about how it will handle complaints. An analogous ground provision will consume a particular portion of commission resources, and the question for women is whether the returns justify the expense.

The problem of diverting resources, and opening the door to considerable litigation, is exacerbated greatly if the CHRC loses its exclusive power to send complaints to a tribunal. The Manitoba Commission is able to keep a tight lid on its open-ended clause because it acts as the gatekeeper for the enforcement of rights in the Manitoba Code. If this aspect of the CHRC's power is changed, then an open-ended clause presents a greater possibility of opening a Pandora's box of uncertainty and unwelcome consequences. An open-ended clause in the hands of a maverick tribunal or judge—from the left or the right of the political spectrum—could generate considerable political controversy and expensive litigation. Women's groups may find they are in court opposing regressive interpretations of the CHRA's open-ended provision, just as they are in court now defending existing laws and policies from Charter challenges.

Even if the CHRC continued to control access to the complaint process, however, its decisions regarding the open-ended clause would be subject to judicial review.

An open-ended clause, when coupled with elimination of the CHRC's gate-keeping function, would produce considerable uncertainty with human rights law. It is hard to imagine that business and employers would appreciate such a degree of uncertainty. Moreover, the greater the uncertainty about the reach of the CHRA, the greater the likelihood of opposition to it.

One symbolic message of an open-ended ground is that the unenumerated grounds are as serious as the prohibited grounds. Both the CHRA and s. 15 already send the implicit message that the prohibited grounds produce equal amounts of harm, and of the same type. An open-ended clause would send the additional message that other unenumerated grounds are also of equal importance. While this may not be the case, it will be difficult for the Commission not to devote resources to them.

Statutory Law May Become Too Much Like the Constitution

If the CHRA mirrored the words of s. 15, it may cause commissions and tribunals, as well as Parliament, to define discrimination in the way courts have defined it under the Charter. We already see evidence of the Charter understanding of discrimination beginning to dominate tribunal interpretation of statutory codes. For instance, many tribunals routinely quote and apply the *Andrews* definition of discrimination. If the words of the CHRA mirror the Charter, this unfortunate tendency would be exacerbated.

Why would this tendency be unfortunate? Because commissions and Parliament are not constrained by theory or precedent in describing a problem or its remedy. They don't need to make their definition of discrimination or inequality fit a predetermined model of equality (the discrimination approach) or precedent. They can be bold. They can define inequalities, for instance, as not requiring a comparison; they can define it as oppression or abuse, or exclusion, even if the comparison group cannot be found (as with pregnancy discrimination). They can respond to systemic injustice as it appears in a complex, post-industrial society. Under the Charter, however, courts respond to allegations, not of injustice, but unconstitutionality, and they must make their responses fit into a line of precedent and tradition. The danger is that if the CHRA mirrors the Charter, tribunals and legislators may tend to believe they are dealing only with another type of Charter right, and be loathe to take the innovative steps necessary to achieve social justice.

Having the CHRA mirror the Charter may enhance the movement toward seeing the CHRA as a quasi-constitutional document, and thus more impervious to legislative change, and more subject to judicial control and interpretation. At the moment, the CHRA is quasi-constitutional because it announces fundamental values and binds the government in its legislative capacity, but it is only quasi because it can be amended in the ordinary manner. However, if it is seen as more like the Charter, it becomes more subject to the control of judges, rather than commissions and politicians.

Whether it is a good thing to have the CHRA become more like the Charter depends on one's view about whether the Charter has benefited women's equality. The record here is spotty, to say the least. Day and Brodsky (1989) concluded that from 1985 to 1989, each step forward under the Charter was accompanied by two steps back. It is clear that defending beneficial laws and policies from Charter challenges, such as the rape-shield provisions of the *Criminal Code*, has absorbed a great deal of energy and has not always met with success (Razack 1991: 109-120).

From a larger perspective, having the CHRA replicate s. 15 further entrenches the Charter's particular vision into Canadian law. As Bakan (1997: 45-62) argues, s. 15 cannot adequately address social and economic inequality because of the very structure and ideology of liberal rights. For instance, rights have a negative orientation: they tell actors—whether governments or others—what they cannot do. As well, they have a dyadic structure. They focus on two actors—the complainant and the respondent—leaving out multi-party relationships and ongoing processes that involve many individuals and organizations. While the CHRA is primarily a liberal document, further reinforcement of its liberal aspects ought not to be undertaken without clear benefits.

Only the courts may add analogous grounds to the Charter. Having tribunals and commissions defer to the analogous grounds in the Charter means they will be deferring to the courts and to judicial understandings of equality. History has shown that, in general, judges are not progressive with respect to their understanding of rights and their sensitivity to equality problems. Indeed, as this report has already noted, it was judicial insensitivity that prompted the establishment of commissions and specialized tribunals. Although the enactment of the Charter in 1982 may have altered the judicial approach to human rights, there is still no evidence that judges are more sensitive to inequality problems. That judges see themselves as the guardians of rights is the message of the *Cooper* case and the strict review that judges have decided to exercise over tribunals and commissions (*Cooper* v. *Canada* 1996). But there is no evidence that judges have a *better* understanding of inequalities, which would cause women to put faith in judges rather than legislators or administrators.

4. CASE STUDY: THE INEQUALITY OF POVERTY

Let us apply these arguments to the inequalities experienced by poor women. Would an analogous ground provision assist poor women in combating discrimination? First, they would need to show that the inequality they experience falls into the federal sector and is at least prima facie within the CHRA. Here one needs to be specific about the particular problem the CHRA is to address. Is it the non-availability of banking services? Is it an inadequate minimum wage? Let us consider the latter, since a challenge would involve a federal law and therefore appears, at least prima facie, to avoid the vexing issues that arise in the private sector. Some poor women make minimum wage working in federally regulated businesses, and their wage is so low they must work at several jobs, rely on food banks and, if possible, engage in other strategies to feed and house themselves and their families. Could they use the new CHRA, with an analogous ground provision, to challenge the low minimum wage? Because the challenge is to a federal law, and not to the action of a private corporation, such as a bank, it could also be brought under s. 15 of the Charter. The advantage of the analogous ground provision in the CHRA is that by filing a complaint with the CHRC, women would not need to initiate their own expensive court action. Once the Commission accepts the complaint, it bears the cost of proceeding, a big advantage for poor women.

The women need to convince the CHRC that all people earning the federal minimum wage are an analogous group. Or, they could argue that poor people are an analogous group. If the Commission accepts either argument, it will need to convince a tribunal that the low minimum wage constituted discrimination on the basis of a ground that falls under the open-ended clause in the CHRA. If that clause has been interpreted as replicating the s. 15 criteria for analogous grounds, the Commission will have an uphill battle. If social assistance recipients are not sufficiently homogeneous to constitute an analogous group, neither will minimum wage earners.

One problem with treating poverty as an analogous ground is that it is then labelled as a personal characteristic, for that is the hallmark of an analogous ground. The label feeds into the myth that poverty is an intrinsic condition, one inherent to the person rather than the result of economic and structural circumstances.

If the hurdle of fitting within the criteria for the open-ended ground is overcome, then the tribunal must accept that the low minimum wage constitutes discrimination. There is no doubt that the wage does not give people sufficient income to live decently and with dignity. Is that sufficient to prove discrimination? Would there need to be an appropriate group for comparison? If so, which group is used for comparison purposes? People who earn the provincial minimum wage? Some other group?

If the women overcome these hurdles and prove discrimination, the remedy they seek would be a higher minimum wage. But under s. 15, the courts have not required positive obligations on governments to implement equality, with perhaps the exception of the *Eldridge* case, in which the cost of equality was very small (*Eldridge* v. *B.C. (Attorney*

General) 1997). Moreover, here there is an additional twist. The cost would not be borne solely by taxpayers, as in *Eldridge*, but also by federally regulated businesses, which would be required to pay a higher minimum wage. Given that courts are loathe to interfere with economic policy at the best of times (*Masse*), it is highly unlikely that it would order the federal government to increase the minimum wage when such an order would affect thousands of companies and businesses across the country. The viability of increasing the wage is an economic decision that courts will leave with legislators.

We see nothing in adding an analogous ground provision that would overcome the traditional deference courts pay to legislators on economic questions. Women may be able to file a complaint, but their chances of success would be minimal. And would the CHRC's time and energy have been well spent, when the chances of success are so low?

This brief analysis is incomplete and perhaps overly negative. It is designed to show that adding an open-ended ground to the CHRA is not a panacea for social problems. Any prohibited ground approach has limited utility in addressing systemic problems, and if the problem stems from economic inequalities, an open-ended clause will do little to change it.

5. CONCLUSION

This report concludes that, on balance, there is little advantage in adding an open-ended clause to the CHRA, and considerable risk associated with it, such as spreading resources and energy too thinly, and further solidifying the power of the courts and their perspective on equality. However, let us assume that we have grossly overstated the risks and dangers, and that the benefits would indeed outweigh the risks. We conclude that the benefits are not sufficient to justify women's groups lobbying for the addition of an open-ended clause. Other changes of much greater magnitude, such as adoption of a regulatory approach to some inequality problems and reform of the complaint process, would make more of a difference to women's lives.

The research question this report addresses may seem mundane and obvious. However, we choose this question because it illustrates how a relatively innocuous change—just adding a few words that are already in the Charter—could have considerable ramifications on human rights practice, not just law. The central focus of legislative revision ought to be on how a change will work in the daily practice of implementing the fundamental values that animate human rights, and its assistance in improving the lives of women on a daily basis. Otherwise, one runs the risk of repeating what the Charter means today for most women—high-sounding words that are, their promise notwithstanding, nothing but words.

BIBLIOGRAPHY

Statutes

Alberta:
Alberta Human Rights, Citizenship and Multiculturalism Act, RSA 1980, c. H-11.7, as amended.

British Columbia:
The Human Rights Code of British Columbia (1973), S.B.C. 1973 (2nd session), c. 119.

Human Rights Act, S.B.C. 1984, c. 22.

Canada:
Canadian Human Rights Act, R.S.C. 1985, H-6, as amended.

Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), c. 11.

Constitution Act, 1982, being Schedule B to the *Canada Act, 1982* (U.K.), c. 11.

Employment Equity Act, S.C. 1995, c. 44.

Indian Act, R.S.C. 1970, c. I-6.

Manitoba:
Human Rights Act, S.M. 1974, c. 65, as amended by S.M. 1976, c. 48.

Human Rights Code, R.S.M. 1987, c. H175.

Ontario:
Pay Equity Act, R.S.O. 1990, c. P.7, as amended.

Quebec:
Charte des droits et libertés de la personne, L.R.Q. c. C-12.

Charter of Human Rights and Freedoms, R.S.Q. c. C-12.

Case Law

Action Travail des Femmes v. *C.N.R.* (sub. nom. *CN* v. *Canada (Canadian Human Rights Commission)*), [1987] 1 S.C.R. 1114.

Alcorn v. *Canada (Commissioner of Corrections)*, [1999] F.C.J. No. 330 (T.D.).

Andrews v. *Law Society of B.C.*, [1989] 1 S.C.R. 143.

Bhadauria v. *Seneca College*, [1981] 2 S.C.R. 181.

Corbière v. *Canada* (1999), 173 D.L.R. (4th) 1 (S.C.C.).

Cooper v. *Canada (Canadian Human Rights Commission)*, [1996] 3 S.C.R. 854.

Dunmore v. *Ontario (A.-G.)* (1997), 155 D.L.R. (4th) 193 (Ont. Ct. Gen. Div.); affirmed [1999] O.J. No. 1104 (Ont. C.A.); appealed [1999] S.C.C.A. No. 196 (S.C.C.) Decision not yet rendered.

Egan v. *Canada* (1995), 124 D.L.R. (4th) 609.

Eldridge v. *British Columbia (Attorney General)*, [1997] 3 S.C.R. 624.

Federated Anti-Poverty Groups of B.C. v. *B.C. (A.-G.)* (1991), 70 B.C.L.R. (2d) (B.C.S.C.)

Gay Alliance Toward Equality v. *Vancouver Sun,* [1979] 2 S.C.R. 435.

Gould v. *Yukon Order of Pioneers*, [1996] 1 S.C.R. 571.

Heerspink v. *I.C.B.C.* (1983), 137 D.L.R. (3d) 219 (S.C.C.).

Janzen v. *Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252.

Jefferson v. *Baldwin and B.C. Ferries*, unreported, September 29, 1976 (Bd. Inq.).

Lopetrone, Bilga and Guarascio v. *George Harrison and Juan de Fuca Hospital Society*, unreported, February 6, 1976 (Bd. Inq.).

Masse v. *Ontario (Minister of Community and Social Services)* (1996), 134 D.L.R. (4th) 20 (Ont. Div. Ct.); leave to appeal denied [1996] O.J. No. 1526 (Ont. C.A.); leave to appeal dismissed [1996] S.C.C.A. No. 373 (S.C.C.).

Miron v. *Trudel* (1995) 124 D.L.R. (4th) 693 (S.C.C.).

Mossop v. *Canada (Attorney General)* [1993] 1 S.C.R. 554.

Oram and McLaren v. *Pho*, unreported, August 8, 1975 (Bd. Inq.).

Vriend v. *Alberta*, [1998] 1 S.C.R. 493.

Zurich Insurance Co. v. *Ontario (Human Rights Commission)*, [1992] 2 S.C.R. 321.

Government Policy Statements and Official Reports

British Columbia:

Annual Reports (Victoria: Human Rights Commission of B.C., 1979, 1980).

Black, "'Reasonable Cause' in Human Rights Legislation." *Labour Research Bulletin.* February 1981, 12-17.

Official Report of Debates of the Legislative Assembly of British Columbia (Hansard), 2nd sess., 33rd Parliament (Victoria: Queen's Printer, 1984-85), vol. 9.

Recommendations for Changes to the Human Rights Code of British Columbia (Victoria: Human Rights Commission of B.C., 1981).

Report on Human Rights in British Columbia (the Black Report) (Victoria: Minister Responsible for Multiculturalism and Human Rights, 1994).

Manitoba:

Manitoba Human Rights Commission, 1987, "Unspecified Grounds of Discrimination."

Annual Reports (Winnipeg: Manitoba Human Rights Commission, 1987-1997).

Monographs

Bakan, Joel. 1997. *Just Words: Constitutional Rights and Social Wrongs.* Toronto: University of Toronto Press

Day, Shelagh and Gwen Brodsky. 1989. *Canadian Charter Equality Rights for Women: One Step Forward or Two Steps Back?* Ottawa: Canadian Advisory Council on the Status of Women.

Hogg, Peter. 1985. *Constitutional Law of Canada* (2nd ed.) Toronto: Carswell, 1985.

Razack, Sherene. 1991. *Canadian Feminism and the Law.* Toronto: Second Story Press.

Articles

Handman, Suzanne and Karen Jensen. 1999. "Pay Equity in Canada: An Overview." 7 C. L. E. L. J. 65-90.

Iyer, Nitya. 1993. "Categorical Denials: Equality Rights and the Shaping of Social Identity." *Queen's Law Journal.* 8, 179-207.

Witelson, Tamar. 1999. "Retort: Revisiting Bhadauria and the Supreme Court's Rejection of a Tort of Discrimination." *National Journal of Constitutional Law.* 10, 149-188.

APPENDIX A: SELECTED CONSTITUTIONAL PROVISIONS

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

35. (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

APPENDIX B: OPTIONS FOR THE CHRA – POSSIBLE WORDING

Current Provision in the CHRA

3.(1) For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for which a pardon has been granted.

(2) Where the ground of discrimination is pregnancy or childbirth, the discrimination shall be deemed to be on the ground of sex.

Here is an example of one substantive provision.

5. It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public

(a) to deny, or to deny access to, any such good, service, facility or accommodation to any individual, or

(b) to differentiate adversely in relation to any individual, on a prohibited ground of discrimination.

An Unreasonable Cause Option

This option is modelled on the old British Columbia legislation.

5.(1) It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public

(a) to deny, or to deny access to, any such good, service, facility or accommodation to any individual, or

(b) to differentiate adversely in relation to any individual,

unless reasonable cause exists for such denial or differentiation.

(2) For the purposes of subsection (1), the race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability or conviction for an offence for which a pardon has been granted of any person or class of persons shall not constitute reasonable cause.

A Group Membership Option

This option is modelled on the existing Manitoba legislation.

3.(1) For all purposes of this Act, "discrimination" means

(a) differential treatment of an individual on the basis of the individual's actual or presumed membership in or association with some class or group of persons, rather than on the basis of personal merit; or
(b) differential treatment of an individual or group on the basis of any characteristic referred to in subsection (2); or
(c) differential treatment of an individual or group on the basis of the individual's or group's actual or presumed association with another individual or group whose identity or membership is determined by any characteristic referred to in subsection (2); or
(d) failure to make reasonable accommodation for the special needs of any individual or group, if those special needs are based on any characteristic referred to in subsection (2).

3.(2) The applicable characteristics for the purposes of clauses (1)(b) to (d) are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability, and conviction for an offence for which a pardon has been granted.

5.(1) No person shall discriminate with respect to the provision of goods, services, facilities or accommodation customarily available to the general public, nor shall any person

(a) deny, or deny access to, any such good, service, facility or accommodation to any individual; or
(b) differentiate adversely in relation to any individual,

unless reasonable cause exists for the discrimination, denial or differentiation.

The Analogous Ground Approach

Proposal 1 – Retains the list of prohibited grounds in a separate provision, which would now include an open-ended clause, and modify the substantive provisions accordingly.

3. (1) For all purposes of this Act, the enumerated grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for which a pardon has been granted.

(2) Where the ground of discrimination is pregnancy or childbirth, the discrimination shall be deemed to be on the ground of sex.

5. It is a discriminatory practice to discriminate, and in particular to discriminate on a enumerated ground, in the provision of goods, services, facilities or accommodation customarily available to the general.

Proposal 2 – Repeats the enumerated and analogous grounds in each provision.

Delete s. 3.

5. Every individual has the right to equal treatment with respect to the provision of goods, services, facilities or accommodation customarily available to the general public without discrimination, and in particular, without discrimination on the basis of race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for which a pardon has been granted.

APPENDIX C: B.C. EXPERIENCE WITH AN UNREASONABLE CAUSE PROVISION

Statutory Provisions

The Human Rights Code of British Columbia (1973), which was proclaimed in 1974 and repealed in 1984, prohibited discrimination in the usual range of activities on a closed list of grounds. In addition, no person could discriminate without reasonable cause in three specific areas:

- public facilities, accommodations, and services (s. 3);
- employment (s. 8); and
- membership in a trade union or occupational association (s. 9).

The language of s. 3 is typical of the wording of all three sections.

3. (1) No person shall

   (a) deny to any person or class of person any accommodation, service or facility, customarily available to the public; or
   (b) discriminate against any person or class of persons with respect to any accommodation, service or facility customarily available to the public, unless reasonable cause exists for such denial or discrimination.

   (2) For the purposes of subsection (1),

   (a) the race, religion, colour, ancestry, or place of origin of any person or class of persons shall not constitute reasonable cause; and
   (b) the sex of any person shall not constitute reasonable cause unless it relates to the maintenance of public decency or to the determination of premiums or benefits under contracts of insurance.

Thus, persons could file complaints with the B.C. Human Rights Commission, arguing that they had been discriminated against without reasonable cause. They needed to prove only one of two branches of without reasonable cause. First, none of the prohibited grounds could constitute a reasonable cause. In this respect, the 1973 Code was identical to any other anti-discrimination statute of its time. Second, any factor that denied services, employment or membership would constitute discrimination unless it was reasonable to use the factor. An absence of a reasonable cause was sufficient for a finding of discrimination. In this respect, the 1973 Code was unique.

Complaints Under the Without Reasonable Cause Provisions

The Commission's annual reports for 1979 and 1980 give the following statistics about the without reasonable cause complaints.

- Without reasonable cause was the third largest group of complaints, after sex, and race or colour.

- One-fifth of all complaints were brought under without reasonable cause: in 1979, 152 out of the 737 cases handled and in 1980, 185 of the 828 complaints handled. These totals include both new cases and cases held over from the previous year.

- In 1980, the 123 new complaints brought under without reasonable cause included almost 40 cases dealing with pregnancy discrimination, about 20 with disability, 15 with mandatory retirement, nine with other age-based discrimination and about 15 with medical condition. Another 20 complaints covered grounds such as size, source of income, family status, criminal charge or conviction, sexual orientation, residency, financial status and educational requirement.

  The relatively large number of complaints could have stemmed from the very short list of prohibited grounds in the 1973 Code which has been expanded significantly since 1973. Approximately 100 of the 123 new complaints filed in 1980 could now be filed under a prohibited ground.

The Commission sent a number of without reasonable cause complaints to boards of inquiry. Between 1975 and 1980, 18 boards of inquiry were appointed to deal with complaints arising on this general ground. The average number per year was three, with a high of six complaints referred in 1975, to none in 1977.

Under the open-ended ground from 1975 to 1980, boards of inquiry dealt with a number of different matters. Disability or physical condition accounted for four of the 18 inquiries, while marital status and sex were the subject of three inquiries each. The remaining eight inquiries concerned a variety of grounds, including age, criminal conviction, sexual orientation and citizenship.

The boards of inquiry dealt with complaints under each of the three available sections of the Code. Nine complaints concerned public services or facilities, 10 concerned employment, and two involved membership in an occupational association.

Interpretation of the Without Reasonable Cause Provision

During the decade in which the provision was in force, the interpretation of without reasonable cause changed from a very broad one to a narrower one. Early case law treated the provision as an invitation to consider the reasonableness of any type of distinction drawn by an employer or service provider. The clause was something akin to a "fairness" test. Consequently, early board decisions took an expansive view of the types of situations protected by the language of the statute. For examp[1]e, in the 1975 *Oram and MacLaren* decision, the board held that personal appearance was not a reasonable cause for a bar to refuse to serve a person. In the 1976 *Lopetrone* decision, the board found that a hospital

society had acted without reasonable cause in failing to consider the applicants' work records when it refused to hire them.

However, this approach did not prevail for long. Beginning with *Jefferson* v. *Baldwin and B.C. Ferries* (1976), boards of inquiry adopted a "categories" approach by asking if the discrimination arose on a group characteristic of the complainant. In *Jefferson*, an employee claimed he suffered discrimination on the basis of his disability, and the board held that physical handicap was included within the without reasonable cause provision. As boards applied the "categories" approach, similarity of the claimant's characteristic to those of the listed grounds became important. Thus, as the approach developed, it resembled more and more the analogous ground approach the Supreme Court would eventually adopt in 1989 for s. 15 claims.

The changed approach gave a less expansive interpretation to without reasonable cause, with boards of inquiry upholding less unusual types of grounds. However, the scope of the without reasonable cause provision was still more expansive than anything found in closed-list human rights codes.

A significant number of board decisions were reviewed by the courts, with mixed results. Two decisions found their way to the Supreme Court of Canada. In the first, *Gay Alliance Toward Equality* v. *Vancouver Sun* (1979), the Court adopted an extremely narrow view of the Code's scope, holding that a newspaper could deny an advertisement solely on the basis of its "gay-friendly" content. Four years later, in *Heerspink* v. *I.C.B.C.* (1983), the Court upheld a board ruling of without reasonable cause in an insurer's denial of coverage to a person charged with a criminal offence. In so doing, the Court endorsed, for the first time, the fundamental importance of human rights legislation. The without reasonable cause provision, by generating a large number of complaints and litigation, did assist in giving prominence to human rights issues.

Contemporary Assessments of the Without Reasonable Cause Provision

After a number of years of experience, interested parties, including the Commission, began to assess the strengths and weaknesses of the without reasonable cause approach. In February 1981, Professor Bill Black prepared a background paper on the development of the reasonable cause provision for the B.C. Minister of Labour to use at a federal–provincial meeting on human rights. In the article, titled "Reasonable Cause in Human Rights Legislation," he outlined the advantages and disadvantages of this approach. The advantages included flexibility to expand protection to new grounds of discrimination, including grounds that would ensure compliance with international covenant. As well, new grounds would be considered in the context of the facts of real cases, making for better consideration of what grounds should be protected in practical situations, and better legislative amendments when they were made.

The disadvantages included the uncertainty about the future interpretation of the Code. On the one hand, the Code could be so broadly interpreted as to usurp much of the field covered by labour legislation, while on the other hand, it could be construed so narrowly as to render

it almost useless as a means of attacking discrimination. Moreover, the words "without reasonable cause" did not give sufficient guidance to members of the public regarding their obligations under the Code. Black suggested that the disadvantages could be avoided or minimized by careful drafting and appropriate administrative action.

In 1980, the Commission undertook a thorough review of the Code. In June 1981, it released a report of the review's findings, outlining changes to extend the Code's coverage and give the Commission more effective powers *(Recommendations for Changes to the Human Rights Code of British Columbia)*. Several recommendations pertained to the without reasonable cause provision.

First, it recommended the addition of two new grounds: sexual orientation, and mental and physical disability. While both grounds had been covered under the without reasonable cause provision, the Commission suggested that including them specifically in the Code's text would give better protection. It also recommended that without reasonable cause be added to the provisions concerning the rental or purchase of property.

Second, the Commission noted that the without reasonable cause provision, while useful, did not make employers or the public generally aware of their obligations. It recommended that it be given the power to make enforceable guidelines that would describe specifically the conduct prohibited by the Code, and bind boards of inquiry.

In its proposals, unfortunately, the report makes only a brief allusion to consideration of enforcement experiences, without any indication of the precise nature of the experience.

The Demise of the Without Reasonable Cause Provision

In other quarters, however, there was little support for the without reasonable cause provision. Consequently, in 1983, the B.C. government moved precipitously to fire the Commission and introduce new legislation to replace the existing open-ended provisions with a closed list. Bill 27 was shelved shortly after it was introduced, but was reintroduced as Bill 11 and enacted the following year.

The government gave a number of reasons for scraping the Code. The suggestion that cutting the Commission was part of the government's measures to save money was dismissed as a ruse by the Opposition. It noted that the overall government budget for 1983 actually increased spending by 16 percent, and the human rights commission spent $1.25 million on human rights programs out of a total $8.6 billion budget (*Hansard,* 2nd sess., 33rd Parliament, vol. 9, at pp. 4392-93).

More important for this report, the government stated that uncertainty about the law's scope and meaning justified the repeal of the Code with its without reasonable cause provision. When he introduced Bill 11 on second reading, the Minister of Labour, the Honourable Robert McClelland, stated:

> [M]ore and more under our present rules, more impossible grounds of discrimination were defined. The meaning of discrimination became less and less clear. How can society deal with really harmful cases of discrimination in employment, tenancy or access to facilities and services when members of the public are so unclear about what discrimination means? The whole concept of human rights and discrimination became diluted, to the extent that it now encompasses just about everything from the most trivial complaints to the most serious violations of human dignity. Who can define discrimination under those circumstances? And if we don't know what it is, Mr. Speaker, how can we ever hope to make progress toward eliminating it through legislation or in other ways? (See *Hansard*, 2nd sess., 33rd Parliament, vol. 9, p. 4373, April 12, 1984.)

In the Legislature, the Opposition argued that the government had chosen to repeal the without reasonable cause provision because it had given rights to groups, especially people with mental and physical disabilities. (See Hansard, 2nd sess., 33rd Parliament, vol. 9, p. 4377-78, April 12, 1984.)

During the course of debate on Bill 11, an Opposition MLA suggested that the "Hunky Bill" case may have galvanized opposition to the Code. In that case, the complainant argued that Konyk, a restaurant owner, discriminated against people of Ukrainian descent by choosing a name for his business which used a term offensive to those of Ukrainian descent. The board of inquiry found that this section did not extend to the name of the business, a decision upheld by the B.C. Supreme Court. The Opposition noted that the case had stirred up a "storm of criticism of the human rights legislation. It was too long, too expensive and too silly in some of the things that went before lawyers, the expense and delay and the whole bit."

Commentary

The B.C. experiment offers several insights for those considering the future shape of the list of grounds in the CHRA.

First, the provision gave the Commission and boards of inquiry a powerful tool to advance the development of human rights law. Long before appearing in the closed lists of other jurisdictions' human rights acts, grounds such as sexual orientation, criminal charge, pregnancy and disability were protected under the without reasonable cause provision.

Second, for a time, the provision insulated the development of human rights law from the vagaries of political ideology. Even after the election of a politically and socially conservative Social Credit government, boards of inquiry continued their progressive approach to protecting the disadvantaged. Indeed, that government was forced to repeal the Code altogether, a move undertaken with little notice and not much more debate, in order to regulate the boundaries of protected grounds.

Third, the provision caught incidents of discrimination that, even today, would still be outside the protection of closed-list provisions. For example, in spite of the fact that they were denied service because of stereotypes, the complainants in *Oram and MacLaren* would have difficulty today arguing that their appearance falls under any enumerated ground.

However, the B.C. experience also points out weaknesses in the without reasonable cause approach.

First, one problem that emerged early on was the possibility that the provision could easily turn into a general unfairness test, one that would catch a very large number of actions, many only marginally significant. The *Lopetrone* case, for example, pushed the limits of what reasonably should be protected by anti-discrimination legislation, and bordered on plunging the Commission into the role of adjudicating fairness in employer decision making. However, the Commission itself recognized this problem when the board in *Jefferson* adopted a "categories" or analogous ground-type reasoning, which tends to eliminate many claims.

Second, the without reasonable cause provision did little to address the problems of those who were discriminated against on grounds subsumed by the phrase "social condition." Indeed, while the Commission received a few complaints on the grounds of source of income, family status, financial status and educational requirement, none of these ever made it to a board of inquiry. It is unclear why this is so; perhaps the Commission was so swamped by the large number of claims on other grounds that social condition assumed low priority. It may also be that the Commission, in the spirit of the times, considered social condition to be a non-ground. But this is speculation; we are left simply to conclude that, in this case anyway, an open-ended type of protection did not extend to social condition.

Third, although one would think that the reasonable cause provisions would encourage boards and courts to consider multiple grounds and intersectionality in adjudicating complaints, there is no evidence that this in fact took place.

Fourth, while the without reasonable cause provisions did promote progressive development of human rights law, some of this development was well ahead of the community consensus needed to sustain it. While it may be tempting to dismiss the repeal of the Code and abolition of the Commission as isolated acts of an especially hostile right-wing government, a significant proportion of B.C. society supported its actions. As a result, the clock was turned back, with some groups losing protection that would only be restored nearly 10 years later.

APPENDIX D: THE MANITOBA EXPERIENCE

Statutory Provision

The first Manitoba *Human Rights Act* enacted in 1974 contained a closed list of prohibited grounds. However, the Act underwent a significant revision in 1976. As well as adding "family status" and "political belief" to the listed grounds in some cases of discrimination, it rephrased the sections that dealt with services and accommodation. The new clauses prohibited discrimination "unless reasonable cause exists for the denial of discrimination" and then provided a non-exhaustive list of grounds that could not constitute reasonable grounds. This language did not change until the Act's repeal in 1987, when it was replaced with the *Manitoba Human Rights Code.*

Section 9(1) of the Code defines discrimination in four subsections, the first of which does not link differential treatment to a prohibited ground. Unlike the old Act, the unenumerated ground is available with respect to all activities covered by the Code, not merely housing and services. The other three subsections require that the differential treatment and failure to make reasonable accommodation be based on one of the prohibited grounds contained in s. 9(2). Section 9 is reproduced below.

9(1) In this Code, "discrimination" means

(a) differential treatment of an individual on the basis of the individual's actual or presumed membership in or association with some class or group of persons, rather than on the basis of personal merit; or
(b) differential treatment of an individual or group on the basis of any characteristic referred to in subsection (2); or
(c) differential treatment of an individual or group on the basis of the individual's or group's actual or presumed association with another individual or group whose identity or membership is determined by any characteristic referred to in subsection (2); or
(d) failure to make reasonable accommodation for the special needs of any individual or group, if those special needs are based upon any characteristic referred to in subsection (2).

9(2) The applicable characteristics for the purposes of clauses (1)(b) to (d) are

(a) ancestry, including colour and perceived race;
(b) nationality or national origin;
(c) ethnic background or origin;
(d) religion or creed, or religious belief, religious association or religious activity;
(e) age;
(f) sex, including pregnancy, the possibility of pregnancy, or circumstances related to pregnancy;
(g) gender-determined characteristics or circumstances other than those included in clause (f);

(h) sexual orientation;
(i) marital or family status;
(j) source of income;
(k) political belief, political association or political activity;
(l) physical or mental disability or related characteristics or circumstances, including reliance on a dog guide or other animal assistant, a wheelchair, or any other remedial appliance or device.

9(3) In this Code, "discrimination" includes any act or omission that results in discrimination within the meaning of subsection (1), regardless of the form that the act or omission takes and regardless of whether the person responsible for the act or omission intended to discriminate.

Number of Unenumerated Grounds Complaints

Since passage of the Code in 1987, there have been very few complaints based on an unenumerated ground. The Commission's annual reports give statistics for 11 years, from 1987 to 1997.

- On average, the Commission received 10 "unenumerated" complaints each year. However, the Commission accepted an unusually high number in 1988 and 1989 (24 and 16, respectively). Since 1990, the average number for each year has been seven complaints.

- The average of 10 complaints each year since 1987 represents only 3.8 percent of the total number of complaints.

Before 1987, the number of complaints on an unenumerated ground was also very small. The Commission has never sent a complaint based on an unenumerated ground to adjudication, either before or after the 1987 changes.

The Substance of Complaints

In December 1987, shortly after enactment of the new Code, the Commission adopted a short policy, "Unspecified Grounds of Discrimination," to assist in the application of the provision. In its entirety, the policy states:

> Section 9(1)(a) will be deemed to include differential treatment which is based on a stereo-typed view of a group of persons rather than on the basis of personal merit regardless of whether the group characteristic is listed in 9(2).

The policy makes it clear that s. 9(1)(a) will only apply to differential treatment that can be linked to group membership. It excludes complaints from individuals who suffer negative treatment because of another person's animosity or personal dislike of them.

According to discussions with Commission staff, the vast majority of complaints based on an unenumerated ground involve criminal record. Typically, a person is denied employment

because of a past conviction. The Commission has resolved many of these complaints in accordance with its policy on criminal record, which describes factors in assessing whether the absence of a criminal record is a bona fide occupational requirement. As noted in Part B, no complaint on an unenumerated ground has ever been sent to a tribunal. (In Manitoba, the human rights tribunal is called a board of adjudication.)

Before 1987, when the unenumerated ground only applied to housing and public services and facilities, the Commission accepted a broader range of complaints, including ones based on sexual orientation and disability. Neither of these grounds was enumerated in the old Act, but they were added to the list in 1978. As well, before 1987, the Commission also dealt with a number of complaints from individuals who were denied entry to restaurants or other facilities because of their dress. Typically, the individuals were wearing blue jeans and were refused entry to one of the many businesses that had implemented a "no jeans" dress code.

The Commission does not publicize the availability of the unspecified ground. Except for a category in the statistical tables called "other," the annual reports do not mention it, nor is its availability noted on the Commission's Web site.

Comments

The Manitoba Commission has adopted a cautious approach to the unspecified grounds provision. In the words of one official, the Commission does not see itself as an "unfairness commission" that deals with any and all forms of injustice. It directs its resources toward dealing with discrimination based on the enumerated grounds.

Its policy, "Unspecified Grounds of Discrimination," is not quite as restrictive as the analogous grounds approach under the Charter. To come within an unspecified ground, a person need only meet the condition of proving "differential treatment which is based on a stereotypical view of a group of persons." In contrast, the Supreme Court's approach to s. 15 includes stereotypes as merely one factor in assessing whether an unenumerated ground will become an analogous ground (*Corbière* v. *Canada*, 1999: ¶ 59-62).

If a version of s. 9(1)(a) were added to the CHRA, the Manitoba experience would likely not be replicated at the federal level. For one thing, the Canadian Human Rights Commission (CHRC) would likely face enormous pressure, especially from large corporations, to use "analogous grounds" reasoning from the beginning. The Manitoba Commission issued its policy before the Supreme Court had developed criteria for analogous grounds under s. 15. Moreover, the CHRC would likely receive more complaints than its Manitoba counterpart, which does not publicize the availability of an unspecified ground. Merely adding an open-ended clause to the CHRA would, in itself, generate considerable publicity. Even if it did not, national organizations and unions would be aware of the unspecified ground and would test its content and limits by filing complaints. With the tendency of several federally regulated employers to seek judicial review of commission decisions, one can reasonably expect litigation.

WOMEN'S SUBSTANTIVE EQUALITY AND THE PROTECTION OF SOCIAL AND ECONOMIC RIGHTS UNDER THE *CANADIAN HUMAN RIGHTS ACT*

Martha Jackman

and

Bruce Porter

TABLE OF CONTENTS

EXECUTIVE SUMMARY 45

INTRODUCTION 47

1. THE INTERNATIONAL CONTEXT FOR REFORM OF THE CHRA 49
   - Canada's Compliance with Its International Social and Economic Rights Obligations 49
   - The Canadian Government's Undertaking to Review Social and Economic Rights Guarantees Under the CHRA 51
   - The Obligation to Provide Effective Remedies for Social and Economic Rights Violations 52

2. THE DOMESTIC CONTEXT FOR REFORM OF THE CHRA 55
   - Social and Economic Rights and the Right to Equality 55
   - The Interdependence of Domestic and International Human Rights Law 56
   - The Failure to Recognize Women's Social and Economic Rights 58
   - Judicial Deference and Social and Economic Rights 62

3. SOCIAL RIGHTS AND EQUALITY RIGHTS: TOWARD AN INTEGRATED APPROACH IN THE CHRA 65
   - The Movement Toward Domestic Protection of Social and Economic Rights 65
   - Why the CHRA Is the Appropriate Place to Begin in Canada 66
   - Including Social and Economic Rights in the CHRA 69

4. CONCLUSION 88

APPENDIX A: MODEL SOCIAL AND ECONOMIC RIGHTS AMENDMENT 90

ENDNOTES 94

EXECUTIVE SUMMARY

The Canadian Human Rights Commission has pointed to the inextricable link between poverty and inequality in Canada, particularly for women, and has questioned whether the Canadian human rights system is based on a definition of "human rights" which is too restrictive, in that it excludes social and economic rights that are a fundamental component of international human rights guarantees. Similarly, recent periodic reviews by United Nations human rights treaty-monitoring bodies have led to unprecedented criticism of Canada for neglecting issues of poverty and social and economic rights, particularly among women.

A crucial component of Canada's international human rights obligations is to provide effective domestic remedies for violations of social and economic rights, and to include social and economic rights in the mandate of its national human rights institution. Moreover, the Paris Principles, endorsed by the United Nations General Assembly in 1994, require that national human rights institutions have a broad mandate, including the duty to review compliance with the international human rights instruments to which the state is a party. In its concluding observations relating to Canada in both 1993 and 1998, the United Nations Committee on Economic, Social and Cultural Rights recommended that Canadian human rights legislation be amended to include social and economic rights. In November 1998, Canada made a commitment to the UN Committee that this recommendation would be addressed in the federal government's review of the *Canadian Human Rights Act* (CHRA).

Recently, the Supreme Court of Canada affirmed that equality rights under the *Canadian Charter of Rights and Freedoms*, like equality guarantees in federal and provincial human rights legislation, require positive measures to address social disadvantage. Nevertheless, when women living in poverty have attempted to challenge government policies denying them access to adequate food, housing and social assistance, their claims have been rejected on the grounds that social and economic rights are beyond the jurisdiction of human rights commissions and the courts. As a result, low-income women have been left without remedies to the most critical issues of discrimination and inequality which they face. If the guarantee of equality in the CHRA is to have meaning for low-income women, it must enable them to challenge discriminatory denials of their social and economic rights, and to hold governments accountable for the failure to meet international human rights obligations to protect and promote the social and economic rights of women and other disadvantaged groups.

The paper proposes that social and economic rights be included in the CHRA, and worded in a manner consistent with international human rights treaties ratified by Canada. The paper argues that including social and economic rights in the CHRA would not alter the Act's essential character or purpose but, rather, would build on what has already been recognized, internationally and domestically, as implicit in the guarantee of dignity and equality.

The proposed amendments would recognize the right to adequate food, clothing, housing, health care, social security, education, work which is freely chosen, child care, support

services and other fundamental requirements for security and dignity of the person. Denying any of these rights based on a prohibited ground of discrimination would be explicitly prohibited, thus clarifying that discrimination complaints ought not to be rejected simply because they engage social and economic rights.

The amended CHRA would also state explicitly that Parliament and the Government of Canada have an obligation to take steps, to the maximum of available resources, with a view to achieving progressively the full realization of the enumerated social and economic rights. A specialized social rights tribunal would be established, to receive and to hear complaints with respect to the "progressive realization" of these rights. The tribunal would have broad remedial powers, but its orders would not come into effect until the House of Commons had sat for at least eight weeks, during which time the order could be overridden by a simple majority vote of Parliament.

Under the proposed amendments to the CHRA, the mandate of the Canadian Human Rights Commission would also be expanded, to include issues of compliance with social and economic rights and with Canada's international human rights treaty obligations. This would bring the Commission into conformity with the Paris Principles, and in step with partner institutions in other countries, such as South Africa, which have explicit mandates to address social and economic rights issues. Most important, the proposed amendments to the CHRA would allow some of the most pressing and fundamental human rights claims of women to move from the margin to the centre of human rights discourse in Canada, recognizing and affirming the role of women's social and economic rights claims in enhancing democratic accountability, participation and transparency.

INTRODUCTION

In 1997, on the eve of the 50th anniversary of the *Universal Declaration of Human Rights*,[1] the Canadian Human Rights Commission acknowledged, for the first time, that poverty is a fundamental human rights issue in Canada, inextricably linked with violations of the right to equality guaranteed under the *Canadian Human Rights Act* (CHRA).[2] As Chief Commissioner Michelle Falardeau-Ramsay stated in her introduction to the Commission's 1997 *Annual Report*:

> Experience suggests that it is largely those who are most vulnerable in our society by virtue of the various prohibited grounds of discrimination—for example, women, Aboriginal people or people with disabilities—who are also more likely to be poor. In the case of women, there is in fact a direct link to pay equity, since many of the working poor are women employed in low-wage, undervalued jobs. But even if that were not the case, it is difficult to argue that poverty is not a human rights issue, given the devastating impact it has on people's lives.... The international community has recognized for some time that human rights are indivisible, and that economic and social rights cannot be separated from political, legal or equality rights. It is now time to recognize poverty as a human rights issue here at home as well.[3]

While the Commission rejected the suggestion that poverty issues are completely beyond its legislated mandate, it called for a review of the narrow scope of human rights protections under the CHRA, asking in particular, "whether the Canadian human rights system is based on a definition of 'human rights' which is too restrictive."[4] The Commission pointed out that, in comparison to international human rights instruments, Canadian human rights laws and the *Canadian Charter of Rights and Freedoms*[5] are limited in scope, with only the Quebec *Charter of Human Rights and Freedoms*[6] referring directly to social and economic rights. In the Commission's assessment: "The impact of fiscal restraint on health, social and educational services—particularly those affecting the most disadvantaged—is beginning to bring home to many Canadians the inescapable link between social and economic security and human rights."[7]

The Canadian Human Rights Commission is not alone in identifying violations of social and economic rights of women and other disadvantaged groups as one of the most critical equality issues of our time, nor in recommending the inclusion of social and economic rights within federal human rights legislation. This is also a dominant theme in recent reviews by United Nations (UN) human rights treaty-monitoring bodies, including recent UN reports relating to Canada.[8] It is clear that women's continuing inequality in the social and economic sphere, including the gender and racial dimensions of poverty and homelessness, and the particular barriers women face in access to child care and other support services necessary for equal participation in Canadian society, have not been effectively addressed within the existing Canadian human rights framework. The current review of the CHRA provides a crucial opportunity to respond to the call for explicit recognition of social and

economic rights under the CHRA in order to ensure that federal human rights law better addresses the real underlying issues of women's substantive inequality.

This paper examines the question of whether, and how, social and economic rights can be effectively protected under the CHRA. Chapter 2 reviews the specific findings and recommendations of UN treaty-monitoring bodies relating to Canada's compliance with its international human rights obligations. This is followed by an examination of this issue from a domestic perspective, including the question of why Canada's existing statutory and constitutional human rights guarantees have been ineffective in promoting women's substantive social and economic equality. Finally, the paper considers how new social and economic rights guarantees under the CHRA should be formulated. Appendix A sets out a draft amendment to the CHRA, in order to provide a clear illustration of how the Act can be amended to strengthen and expand social and economic rights protections for women, without weakening existing equality guarantees.

1. THE INTERNATIONAL CONTEXT FOR REFORM OF THE CHRA

Canada's Compliance with Its International Social and Economic Rights Obligations

Over the last year, Canada has undergone its five-year periodic review for compliance with both the *International Covenant on Economic, Social and Cultural Rights* (ICESCR)[9] and the *International Covenant on Civil and Political Rights* (ICCPR).[10] This follows a 1997 review of Canada's performance under the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW).[11] The three reviews demonstrate an emerging consensus in the international human rights community that the deterioration of social programs and the unequal enjoyment of social and economic rights in Canada represent a profound assault on the equality rights of women and other disadvantaged groups.

In the past, the Human Rights Committee, which oversees the implementation of the ICCPR, has tended to leave poverty issues to the Committee on Economic, Social and Cultural Rights, which is responsible for monitoring performance under the ICESCR. However, in its 1999 evaluation of Canada's compliance with the equality rights provisions of the ICCPR,[12] the Human Rights Committee highlighted the disproportionate effect of poverty on women and the discriminatory effect of social program cuts in Canada. In its concluding observations, the Human Rights Committee stated:

> The Committee is concerned that many women have been disproportionately affected by poverty. In particular, the very high poverty rate among single mothers leaves their children without the protection to which they are entitled under the Covenant. While the delegation expressed a strong commitment to address these inequalities in Canadian society, the Committee is concerned that many of the programme cuts in recent years have exacerbated these inequalities and harmed women and other disadvantaged groups. The Committee recommends a thorough assessment of the impact of recent changes in social programmes on women and that action be undertaken to redress any discriminatory effects of these changes.[13]

The Human Rights Committee also criticized the lack of effective remedies for human rights violations in Canada, recommending that "relevant human rights legislation be amended so as to guarantee access to a competent tribunal and to an effective remedy in all cases of discrimination."[14] It pointed to gaps between protections under the ICCPR and those available under the Canadian Charter and other domestic human rights statutes, recommending "that consideration be given to the establishment of a public body responsible for overseeing implementation of the *Covenant* and for reporting on any deficiencies."[15]

When, during oral questioning of the Canadian delegation, the Human Rights Committee asked about the gaps between domestic and international human rights protections, and the lack of domestic mechanisms for reviewing compliance with human rights treaty obligations, the head of the Canadian delegation, the Honourable Hedy Fry, referred to the

upcoming review of the CHRA. Minister Fry stated she would recommend, in the context of that review, that the mandate of the Canadian Human Rights Commission be expanded to include issues of compliance with international human rights treaties ratified by Canada.[16]

The discriminatory effects of social program cuts were also a matter of comment in the most recent review of Canada's compliance under CEDAW. In its concluding remarks in 1997, the Committee on the Elimination of Discrimination Against Women expressed concern about the reduction in women's access to health care due to privatization, the insufficient attention paid by governments to the impact of regional and international economic and structural changes on women and "the deepening poverty among women, particularly among single mothers, aggravated by the withdrawal, modification or weakening of social assistance programmes."[17] To address these concerns, the Committee suggested that "the Government address urgently the factors responsible for increasing poverty among women and especially women single parents and that it develop programmes and policies to combat such poverty."[18]

The concerns expressed by the Human Rights Committee and by the Committee on the Elimination of Discrimination Against Women were stated in even stronger terms by the Committee on Economic, Social and Cultural Rights in its review of Canada under the ICESCR.[19] In its concluding observations, released in December 1998, the Committee pointed to the particular discriminatory impact on women of measures such as the federal government's repeal of the Canada Assistance Plan (CAP).[20] The Committee noted, with "grave concern," that "the repeal of CAP and cuts in social assistance rates, social services and programmes have had a particularly harsh impact on women, in particular single mothers, who are the majority of the poor, the majority of adults receiving social assistance and the majority among users of social programmes."[21] The Committee also drew attention to the link between poverty and women's ability to escape domestic violence.

> The Committee is concerned that the significant reductions in provincial social assistance programmes, the unavailability of affordable and appropriate housing and widespread discrimination with respect to housing create obstacles to women escaping domestic violence. Many women are forced, as a result of those obstacles, to choose between returning to or staying in a violent situation, on the one hand, or homelessness and inadequate food and clothing for themselves and their children, on the other.[22]

Like its findings in 1993, the Committee's 1998 concluding observations received extensive media coverage and were hotly debated in Parliament.[23] The Government argued that the Committee's negative evaluation of Canada's lack of progress in dealing with poverty was belied by Canada's number one ranking under the UN Development Program's Human Development Index from 1993 to 1998. However, as the Committee's assessment makes clear, it is Canada's overall affluence that makes the extent of poverty and homelessness in Canada a violation of international human rights norms.[24] And, while the Government's response may have been disingenuous, it is part of a general tendency in Canada to characterize the Committee's concluding observations as a social development review rather than an assessment of Canada's compliance with its human rights treaty obligations. To

fulfil its obligations under the ICESCR, the Canadian government must do more than review its social policy priorities. It must also change federal laws to ensure adequate legal protection against the social and economic rights violations which poverty and homelessness represent, particularly for women.

The Canadian Government's Undertaking to Review Social and Economic Rights Guarantees Under the CHRA

Too little attention has been paid to the Committee on Economic, Social and Cultural Rights' overriding concern, in both 1993 and 1998, about the absence of domestic remedies to violations of social and economic rights. The Committee has repeatedly criticized the tendency, by politicians and courts in Canada, to treat social and economic rights as mere policy objectives of governments rather than as enforceable human rights. One of the Committee's key recommendations to address this concern, in 1993, was that social and economic rights be expressly incorporated into federal and provincial human rights legislation.[25]

In its list of issues submitted to Canada before its 1998 review, the Committee asked whether the Government of Canada would be "acting on the recommendation of the Canadian Human Rights Commission that the ambit of human rights protections in Canada be expanded to include social and economic rights."[26] In answer, the Government stated: "[T]he Government of Canada will consider this recommendation as part of its comprehensive review of the *Canadian Human Rights Act,* which is scheduled to commence shortly" and that it was "inappropriate to make any commitment to amend the legislation without such analysis as well as without consulting with other organizations and interested citizens."[27] During oral questioning, the Committee pressed the Canadian delegation to explain the continued failure of the federal government to amend the CHRA, suggesting that the reference to the upcoming review of the Act did not explain why no action had been taken over the five years since the Committee's last review. The Canadian delegation again assured the Committee that the matter would be considered in the upcoming review of the CHRA.[28]

In its concluding remarks, the Committee noted, as a "positive measure," the "Canadian Human Rights Commission's statement about the inadequate protection and enjoyment of economic and social rights in Canada and its proposal for the inclusion of those rights in legislation, as recommended by the Committee in 1993."[29] In its list of recommendations, the Committee repeated its call for reform of Canadian human rights laws.

> The Committee again urges federal, provincial and territorial governments to expand protection in human rights legislation to include social and economic rights and to protect poor people in all jurisdictions from discrimination because of social or economic status. Moreover, enforcement mechanisms provided in human rights legislation need to be reinforced to ensure that all human rights claims not settled through mediation are promptly determined before a competent human rights tribunal, with the provision of legal aid to vulnerable groups.[30]

The Obligation to Provide Effective Remedies for Social and Economic Rights Violations

As the Canadian Human Rights Commission has pointed out, Canada's statutory human rights framework has changed little over the last 30 years.[31] Grounds of discrimination have been added and jurisprudence has evolved, but the underlying presupposition has remained that enforceable "human rights" in the CHRA are limited to protection from discrimination on a number of specific enumerated grounds. Internationally, the human rights movement has been far from static, particularly in the area of social and economic rights. In 1977, when the CHRA was first enacted, the ICESCR had only just come into effect for Canada. There was no effective review mechanism under the ICESCR, and very little understanding of what obligations flowed from it. Still, under the effect of the cold war, the human rights movement tended to bifurcate economic, social and cultural rights from civil and political rights, with virtually no attention to problems of enforcement of the former.

Though the ICESCR still has no optional protocol for a complaint procedure parallel to the ICCPR, the Committee on Economic, Social and Cultural Rights has adopted novel procedures for the incorporation of oral submissions from non-governmental organizations (NGOs) into state party review. The result is that, in the context of the periodic reviews of their compliance with the ICESCR, states are frequently required to respond to documented allegations of non-compliance from NGOs. In contrast to what was previously an "expert review" role, which did not allow for direct participation by those presenting evidence about government non-compliance with the Covenant, the Committee increasingly assumes more of an "adjudicative" role.[32] The Committee now assesses the relative merits of arguments and information presented by NGOs and governments, and issues what amount to "findings" with respect to compliance with the Covenant.[33] Thus, the international community has begun to feel more comfortable with the idea of social and economic rights being claimed and adjudicated in the same manner as other human rights.

In 1998, the Committee adopted two general comments that directly address the issue of justiciability and the provision of legal remedies through domestic human rights legislation.[34] In General Comment No. 9 on the domestic application of the ICESCR, the Committee rejects the notion that social and economic rights are inherently unsuitable for judicial enforcement. It adopts a rigorous standard that states are required to meet to justify the denial of legal remedies in the social and economic rights area. The Committee asserts that state parties to the ICESCR are required to provide for legal remedies in two ways: through consistent interpretation of domestic law, particularly in the area of equality and non-discrimination, and through the adoption of legislative measures to provide legal remedies for violations of social and economic rights.[35]

The Committee points out that it is well established in international law that courts and tribunals must interpret and apply domestic law in a manner consistent with a state's international human rights obligations, but this principle of interpretation has had little effect in many countries insofar as social and economic rights are concerned. As the Committee explains: "There remains extensive scope for the courts in most countries to place greater reliance upon the Covenant."[36] This is particularly true of the interpretation and

application of non-discrimination and equality rights which, as Shelagh Day and Gwen Brodsky have argued, form an effective bridge between civil rights and social and economic rights.[37] As General Comment No. 9 explains:

> Thus, when a domestic decision maker is faced with a choice between an interpretation of domestic law that would place the state in breach of the Covenant and one that would enable the State to comply with the Covenant, international law requires the choice of the latter. Guarantees of equality and non-discrimination should be interpreted, to the greatest extent possible, in ways which facilitate the full protection of economic, social and cultural rights.[38]

The Committee is careful to leave room for variation from state to state as to how social and economic rights should be protected within domestic legal systems, noting that "the precise method by which Covenant rights are given effect in national law is a matter for each State party to decide."[39] Nevertheless, the Committee lays out three basic principles of compliance, based on the overriding duty to provide effective domestic remedies for social and economic rights violations. First, the means chosen by the state must be adequate to give effect to the rights in the ICESCR. In many cases, this includes judicial enforcement, particularly when it comes to protecting the most vulnerable. As the Committee explains:

> The adoption of a rigid classification of economic, social and cultural rights which puts them, by definition, beyond the reach of the courts would thus be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent. It would also drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society.[40]

To satisfy the non-discrimination provisions of the ICESCR, judicial enforcement is, the Committee asserts, indispensable.[41] Second, protection for social and economic rights should be comparable to, and integrated with, the protection provided for civil and political rights. Where the means used to give effect to the ICESCR "differ significantly" from those used in relation to other human rights treaties, "there should be a compelling justification for this, taking account of the fact that the formulations used in the Covenant are, to a considerable extent, comparable to those used in treaties dealing with civil and political rights."[42] Third, the Committee suggests that direct incorporation of ICESCR rights into domestic law, though not absolutely required, is desirable in order to enable individuals to invoke Covenant rights directly through court action.[43]

The Committee's General Comment No. 10, on the role of national human rights institutions in the protection of social and economic rights, flows directly from the principles laid out in General Comment No. 9. It is clearly incompatible with the fundamental principle of the interdependence and indivisibility of all human rights for domestic human rights institutions to focus solely on civil rights. The Committee notes that, while national human rights institutions "have a potentially crucial role to play in promoting and ensuring the indivisibility and interdependence of all human rights," this role has too often been

neglected. In the Committee's view, it "is therefore essential that full attention be given to economic, social and cultural rights in all of the relevant activities of these institutions."[44] General Comment No. 10 outlines a number of possible roles for human rights institutions with respect to social and economic rights. These include:

- review legislation and administrative practice for compliance with social and economic rights;
- promote public education and information programs;
- investigate complaints of violations; and
- hold inquiries into the realization of social and economic rights within the country as a whole, or within particular vulnerable constituencies.[45]

The Committee's general comments—along with the recommendations contained in its concluding observations relating to Canada—put forward a coherent and compelling vision of the role of domestic human rights laws, and the CHRA in particular, in providing appropriate remedies against the social and economic rights violations experienced most systemically by low-income women. As discussed in Chapter 2, the inclusion of social and economic rights under the CHRA is not only necessary to bring Canada into compliance with its treaty obligations under the ICESCR, it is also consistent with the conception of equality which has evolved under federal and provincial human rights law over the last 20 years and, more recently, under the Canadian Charter.

2. THE DOMESTIC CONTEXT FOR REFORM OF THE CHRA

Social and Economic Rights and the Right to Equality

Violations of social and economic rights in Canada are inherently connected to violations of the right to equality. In a country as affluent as ours, the issue is not an inability to guarantee the essential enjoyment of social and economic rights because of limited resources, but rather a failure to address adequately social and economic inequality which denies the enjoyment of these rights to certain groups. The Committee on Economic, Social and Cultural Rights, the Human Rights Committee and the Committee on the Elimination of Discrimination Against Women have all underscored the disproportionate impact of social program cuts on women and other disadvantaged groups, and have condemned the discriminatory nature of poverty in Canada. Canada's perplexity at the increasingly harsh criticism from international human rights treaty-monitoring bodies stems, in part, from a lack of understanding that evolving international jurisprudence increasingly emphasizes the links between social and economic rights, and the right to equality. This is reflected in the emphasis the Committee on Economic, Social and Cultural Rights places on equality rights jurisprudence under the Charter and Canadian human rights legislation, and in the fact that the Committee focusses its analysis of compliance with the ICESCR on the situation of "vulnerable groups"—those qualifying for protection under s. 15 of the Charter—assessing how they fare in relation to access to housing, food, health care, education and work, in comparison to the rest of Canadian society.[46]

It is important to understand that the proposal to include social and economic rights in the CHRA is not intended to alter the Act's essential character or purpose. Rather, its objective is to fill out the current approach to the protection of equality and dignity, and to build on what has already been recognized, internationally and domestically, as implicit in that guarantee. For this reason, the Committee's recommendation that the CHRA incorporate social and economic rights goes hand in hand with its insistence that constitutional and statutory guarantees of equality and non-discrimination be interpreted expansively to provide, wherever possible, remedies to violations of social and economic rights.

Recognizing social and economic rights as fundamental components of equality rights is consistent with the evolving equality rights analysis of the Supreme Court of Canada, as well as with its emerging jurisprudence on the role of international law in interpreting the Canadian Charter and human rights legislation. The Supreme Court has identified equality as one of the fundamental values of our society, against which the objects of all legislation must be measured. It has affirmed, with respect to section 15 of the Charter in particular, that it is the "broadest of all guarantees" which "applies to and supports all other rights."[47] The idea of equality which is at the core of a purposive approach to the Charter, and which is essential to the Charter's role in implementing international human rights obligations, is not formal but rather substantive equality. As LaForest, J. explains in his decision for the Court in *Eldridge* v. *British Columbia (Attorney General)*[48]: "the purpose of s. 15(1) of the *Charter* is not only to prevent discrimination by the attribution of stereotypical

characteristics to individuals, but also to ameliorate the position of groups within Canadian society who have suffered disadvantage by exclusion from mainstream society."[49]

Equality, as the Court has insisted since its very first decision on the scope of s. 15 in *Andrews* v. *Law Society of British Columbia*,[50] is not about same treatment. Rather, the "accommodation of differences...is the essence of true equality."[51] The Court has held that positive measures may be required to ensure equality, and the right to equality may be breached by omission or failure to act to address the needs of disadvantaged or vulnerable groups. As LaForest, J. declares in *Eldridge*:

> ...the respondents...maintain that s.15(1) does not oblige governments to implement programs to alleviate disadvantages that exist independently of state action...[and] that governments should be entitled to provide benefits to the general population without ensuring that disadvantaged members of society have the resources to take full advantage of those benefits. In my view, this position bespeaks a thin and impoverished vision of s. 15(1). It is belied, more importantly, by the thrust of this Court's equality jurisprudence.[52]

In affirming the idea of substantive equality under s. 15, the Court has explicitly acknowledged that it is incorporating an approach to equality that was first developed under Canadian human rights legislation.[53] In *Eldridge*, LaForest, J. points out that the idea that equality rights may create positive obligations to address needs related to disadvantage is not new, but is well established under human rights legislation. He notes that the concept of adverse effect discrimination includes the recognition that there is a positive duty on respondents to accommodate the needs of disadvantaged groups. As he puts it: "The principle that discrimination can accrue from a failure to take positive steps to ensure that disadvantaged groups benefit equally from services offered to the general public is widely accepted in the human rights field."[54] Demands that the CHRA include specific provisions relating to social and economic rights, in order to address the broader patterns of women's social and economic disadvantage, are thus an extension of the substantive approach to equality developed under human rights legislation.[55]

The Interdependence of Domestic and International Human Rights Law

In addition to the positive developments in the Supreme Court's approach to equality, the Court has increasingly recognized the importance of international human rights, including social and economic rights, in interpreting the Charter and human rights guarantees. Writing for the majority in *Slaight Communications* v. *Davidson,*[56] Chief Justice Dickson cited his earlier assertion, in *Reference Re Public Service Relations Act (Alta),* that "the *Charter* should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada ratified."[57] This "interpretive presumption" was recently reaffirmed in *Baker* v. *Canada*,[58] even though the Charter was not directly at issue in the case. Referring to the Court's decisions in *Slaight Communications*[59] and *R.* v. *Keegstra*,[60] L'Heureux-Dubé, J. asserts, for the majority in *Baker*, that international law is "a critical influence on the interpretation of the scope of the

rights included in the *Charter*."[61] This statement is consistent with her earlier statement in *R. v. Ewanchuk*, that "our *Charter* is the primary vehicle through which international human rights achieve a domestic effect."[62]

In addition to reaffirming the importance of international human rights in Charter interpretation, the Court in *Baker* also affirmed, for the first time, that the interpretation and application of administrative law in Canada, whether federal or provincial, must be consistent with international human rights treaties ratified by Canada. This principle will have important implications for the interpretation of human rights legislation, which is directly linked, historically, and in some instances through explicit reference, to international human rights.[63]

In *Slaight Communications,* the "right to work" under the ICESCR was invoked by the majority of the Court in aid of Charter interpretation. In *Baker*, the "best interests of the child" provisions under the Convention on the Rights of the Child (CRC) were used to interpret the proper exercise of discretion under the federal *Immigration Act*. Although neither of these provisions has a direct counterpart under the Charter, the Court was nevertheless, prepared to consider them in applying the Charter and in interpreting domestic legislation. A decade ago, in considering the ambit of the right to security of the person under s. 7 of the Charter in the *Irwin Toy* case, the Supreme Court held that it would be "precipitous" to rule out at an early stage of Charter interpretation "such rights, included in various international covenants, as rights to social security, equal pay for equal work, adequate food, clothing and shelter."[64] The Court has not since been called on to revisit this issue directly. But with the emergence of the "interpretive presumption" put forward in *Slaight Communications*, the admission that international social and economic rights *could* be included under the Charter has increasingly been taken, at least at the international level, as a statement that they *should*. Otherwise, the Court would be opting for an interpretation of the Charter that would place Canada in breach of its obligations under the ICESCR and other international human rights laws.

In the list of issues the Committee on Economic, Social and Cultural Rights submitted to Canada before its 1998 review, the Committee asked the following question.

> In 1993 the Government had informed the Committee that section 7 of the *Charter* at least guaranteed that people are not to be deprived of basic necessities and may be interpreted to include rights under the Covenant, such as rights under article 11 [to an adequate standard of living, including adequate food, clothing and housing]." Is that still the position of all governments in Canada?[65]

The Government responded to the Committee's question as follows.

> The Supreme Court of Canada has stated that section 7 of the *Charter* may be interpreted to include the rights protected under the Covenant (see decision of *Slaight Communications v. Davidson* [1989] 1 S.C.R. 1038). The Supreme Court has also held section 7 as guaranteeing that people are not to be

> deprived of basic necessities (see decision of *Irwin Toy v. A.-G. Québec,* [1989] 1 S.C.R. 927). The Government of Canada is bound by these interpretations of section 7 of the *Charter*.[66]

Thus, as the Government has directly acknowledged,[67] an approach to the Charter that gives appropriate weight to the social and economic rights of women is an important component of Canada's international human rights undertakings. As L'Heureux-Dubé, J. points out in *Ewanchuk*, two sections of the Charter will be especially important in giving domestic effect to international human rights obligations. "In particular, s. 15 (the equality provision) and s. 7 (which guarantees the right to life, security and liberty of the person) embody the notion of respect of human dignity and integrity."[68] These interdependent rights are recognized, as well, as the core values of human rights legislation. As the preface to Ontario's *Human Rights Code* affirms, human rights legislation is based on the "recognition of the inherent dignity and the equal and inalienable rights of all members of the human family" in accordance with the Universal Declaration.[69]

There is a sizable gap, however, between the conceptual approach to the interdependence of Charter rights, those under human rights legislation and international human rights advocated by the Supreme Court, and the actual approach of lower courts and domestic human rights bodies to poverty issues confronting women in Canada. As the chair of the Panel appointed to review the CHRA, the Honourable Mr. Justice Gérard V. LaForest, has written:

> Increasingly, through general conventions and treaties, the international community is creating international institutions and norms governing transnational activities and concerns. But these initiatives cannot be successful unless these international norms are applied with sophistication and understanding by the various national decision-makers before whom they are invoked. Unless these norms are integrated into the various national governmental processes, the rule of law cannot expand to adequately protect individuals throughout the world.[70]

When women in Canada have advanced claims to the equal enjoyment of social and economic rights, based on the Charter or on human rights legislation, international norms have not been applied with "sophistication and understanding." Rather, they have been entirely ignored.

The Failure to Recognize Women's Social and Economic Rights

While the Supreme Court has established that equality analysis should be "effects based," have a strong remedial component, be oriented toward alleviating disadvantage and recognize that discrimination may result from inaction, equality rights have failed low-income women when they have tried to apply these rights to the most pressing issues of discrimination and inequality they face—those related to poverty. Canadian courts have not been prepared to recognize, either under the Charter or under human rights legislation, a legitimate judicial role in protecting the equal enjoyment of women's social and economic

rights. Instead, Canadian lower courts have relied on what the Committee on Economic, Social and Cultural Rights has condemned as the "rigid classification of economic, social and cultural rights which puts them, by definition, beyond the reach of the courts."[71] In its most recent concluding observations, the Committee described the impact of this approach on the protection of women's social and economic rights in Canada.

> The Committee has received information about a number of cases in which claims were brought by people living in poverty (usually women with children) against government policies which denied the claimants and their children adequate food, clothing and housing. Provincial governments have urged upon their courts in these cases an interpretation of the *Charter* which would deny any protection of Covenant rights and consequently leave the complainants without the basic necessities of life and without any legal remedy.[72]

The Committee went on to criticize the interpretive stance of Canadian lower courts vis-à-vis the Charter.

> The Committee is deeply concerned at the information that provincial courts in Canada have routinely opted for an interpretation of the *Charter* which excludes protection of the right to an adequate standard of living and other Covenant rights. The Committee notes with concern that the courts have taken this position despite the fact that the Supreme Court of Canada has stated, as has the Government of Canada before this Committee, that the *Charter* can be interpreted so as to protect these rights.[73]

It is impossible, in the context of this paper, to describe in detail all the cases to which the Committee refers. One case, however, loomed large in the Committee's review and merits particular attention. In *Masse* v. *Ontario,*[74] 12 Ontario social assistance recipients, including seven sole support mothers, asked the Ontario courts to strike down a 21 percent cut in provincial social assistance rates—a reduction which, three years later, the Committee on Economic, Social and Cultural Rights found to have had "a significantly adverse impact on vulnerable groups, causing increases in already high levels of homelessness and hunger."[75]

The Ontario Court, General Division, did not disagree with this assessment of the impact of the provincial welfare rate cuts. The Court heard uncontroverted evidence that the cuts would force at least 67,000 single mothers and their children from their homes, and would cause significant increases in hunger, particularly among single mothers.[76] Corbett, J. described the effects of the rate cut on the applicants who were single mothers, as follows.

> O'Sullivan, Monnell, Panzuto, Atkins, Gibbons, Morin and Grimes are single parents who fear losing their existing accommodation, and the deprivations associated with lower income such as less money for food, clothing and educational needs. Some fear losing custody of their children or being forced to return to an abusive marriage as a result of the reductions.... This brief overview does not sufficiently capture the extent of the effects of the

> reductions on these applicants and their children. The daily strain of surviving and caring for children on low and inadequate income is unrelenting and debilitating. All recipients of social assistance and their dependants will suffer in some way from the reduction in assistance. Many will be forced to find other accommodation or make other living arrangements. If cheaper accommodation is not available, as may well be the case, particularly in Metropolitan Toronto, many may become homeless.[77]

There is no doubt that the evidence accepted by the Court in *Masse* demonstrated a clear violation of the ICESCR, the ICCPR, CEDAW and the CRC, both in respect of the denial of the substantive right to an adequate standard of living under Article 11 of the ICESCR and Article 27 of the CRC, and in terms of the discriminatory burden of the proposed cuts on women and children, in violation of the non-discrimination guarantees in all four covenants.[78] The applicants in *Masse* asked the Court to interpret their rights to security of the person and to equality under the Charter in light of Canada's international human rights obligations. They referred the Court to the 1993 concluding observations of the Committee on Economic, Social and Cultural Rights, pointing to the recommendation that Canadian courts adopt an expansive interpretation of the rights in the Charter "so as to provide appropriate remedies to violations of social and economic rights;"[79] that greater attention be paid by governments to problems of poverty and homelessness, particularly among single mothers; and that social assistance rates be increased to a level which would guarantee the rights in article 11 of the ICESCR to adequate food, clothing and housing.[80] In its decision rejecting the applicants' Charter claims, the Court simply ignored international human rights law, including Canada's specific obligations under the ICESCR, and relied on the principle that social and economic rights are unenforceable by the courts. O'Brien, J. asserted that "much economic and social policy is simply beyond the institutional competence of the courts."[81] Similarly, O'Driscol, J., in a separate concurring judgment, rejected the applicants' claims on the basis that the court has no jurisdiction "to second guess policy/political decisions," [82] quoting from the United States Supreme Court in *Dandridge* v. *Williams* that "the intractable economic, social and even philosophical problems presented by public welfare assistance programs are not the business of this Court."[83]

Low-income women elsewhere in Canada who have attempted to rely on the Charter's guarantee of equality and security of the person, or guarantees under human rights legislation, have encountered judicial responses similar to those in *Masse*. Issues related to social and economic rights, even where they intersect clearly with issues of equality or security of the person, have been found by the courts to be outside the ambit of the Charter or human rights protections.[84] For example, in Nova Scotia, Faye Conrad challenged the denial of interim assistance to cover basic necessities of food and housing for herself and her child, while an allegation that she had been living with a man was investigated. The Nova Scotia Court of Appeal held that the Charter cannot provide protection of economic interests.[85] In New Brunswick, when Jeannine Godin challenged the denial of legal aid in child protection proceedings, the New Brunswick Court of Appeal ruled that "the provision of domestic legal aid is a legislative function and not one for determination by the courts."[86]

In Ontario, Elizabeth Wiebe relied on her rights under provincial human rights legislation to challenge the refusal by local welfare authorities to provide any emergency assistance for motel accommodation when her family was forced to live in a garage. She and her husband subsequently had to relinquish voluntarily four of their children to temporary foster care. In her claim,[87] Ms. Wiebe asserted that municipal and provincial governments had a duty to take positive measures to address the needs of large families relying on social assistance. She asked that, in exercising its discretionary power to dismiss complaints or refer them to a board of inquiry, the Ontario Human Rights Commission consider Canada's recognition of the right to housing in international law. The Commission dismissed Ms. Wiebe's complaint, seven years after it was filed, after being advised by the investigating officer that the issues involved did not appear to fall within the jurisdiction of the Commission.[88]

Also in Ontario, Debbie Clark, a single mother of a disabled child, was unable to pay a $312 utility deposit, which municipal welfare authorities would not cover. Without the deposit, her hydro service would be disconnected. She challenged the deposit requirement under ss 7 and 15 of the Charter, relying, in part, on her right to adequate housing under the ICESCR. In dismissing her s. 7 arguments, the Ontario Court General Division held that "This type of claim requires the kind of value and policy judgments and degree of social obligation which should properly be addressed by legislatures and responsible organs of government in a democratic society, not by courts...."[89] With regard to her s. 15 claim, the Court concluded: "No incursion on fundamental social values has been shown by virtue of what is simply a policy by a utility to protect against the risk of non-payment by certain customers."[90]

In Quebec, Louise Gosselin challenged the reduction of her welfare entitlement to one third of the amount that had been established as required to meet basic requirements.[91] In her claim, Ms. Gosselin asserted that she could not possibly afford housing and other necessities on the $170/month provided to recipients under 30 years of age under the Quebec social assistance regime and that, as a consequence, she was hungry and homeless for a time and agreed to live in an intimate relationship with a man she did not wish to live with, in exchange for having a place to live and food to eat. In dismissing her claim under the Canadian Charter and the Quebec *Charter of Human Rights and Freedoms*, the Quebec Superior Court held that:

> The Charter is not an obstacle to parliamentary sovereignty...if positive obligations were to be inferred, they would be those of the courts which, with or without approval, would ultimately determine the choices of the political order.... But this role has not been given to the judiciary under the Charter. The courts cannot substitute their judgment in social and economic matters for that of legislative bodies for the purpose of judging such matters. [translation].[92]

A majority of the Quebec Court of Appeal recently upheld the view that social and economic rights are not included under the Canadian Charter, and the courts are not empowered by the Quebec Charter to review the adequacy of provincial social security measures. In Baudouin, J.'s view: "The question resides with the legislative body and is strictly political, not judicial" [translation].[93]

Judicial Deference and Social and Economic Rights

In assessing the appropriate role for tribunals and courts in the social and economic realm, it is important to acknowledge that women living in poverty go to the courts and to human rights commissions and tribunals with social and economic rights claims for the same reasons women have gone there in the past with other types of human rights cases. It is not out of any naïveté about how judges are likely to react to their claims, nor of any resolve to abandon democratic processes. It is because low-income women see these issues as human rights issues, and only courts and tribunals have the power to address them as such. In the case of social and economic rights claims, however, the class and gender bias of the courts which has always been encountered by women pursuing human rights claims will be invoked by some, not as a reason to fight even harder for recognition of these rights, but as a reason for continuing to deny them. The suggestion that social and economic rights should be included in the CHRA is likely to provoke the same objections as are raised in relation to the Canadian Charter: that it would give inappropriate power to human rights tribunals and, ultimately, to an unelected judiciary. Like the judges in the cases described above, some will argue that giving courts or tribunals the power to meddle in social and economic policy is a profound assault on democracy and parliamentary sovereignty.[94] These concerns have historically prevented the development of a united front, even among traditional allies for social justice, in favour of protecting social and economic rights in Canadian law.[95]

The limited experience of judges in relation to the poverty issues of low-income women poses a significant obstacle to the advancement of social and economic rights claims in Canada. Concerns about preserving the democratic sovereignty of Parliament are also legitimate ones. Including social and economic rights in human rights legislation does not, however, give courts and tribunals unrestricted authority to determine social policy. Neither does it send a message to tribunals and courts that they should abandon their concerns about judicial deference.[96] Rather, the inclusion of social and economic rights in human rights legislation will provide much needed guidance to courts and tribunals about when it is appropriate for them to intervene in matters of social and economic policy. Existing equality jurisprudence makes it clear that the courts have the authority and responsibility, both under human rights legislation and the Charter, to intervene on behalf of disadvantaged groups to ensure that governments take necessary positive measures to ensure equality.[97] The question is not whether courts and human rights tribunals should have a role in these areas, but rather, in what circumstances should they intervene and to what purpose?

An Ekos Research focus group study, commissioned by the federal government to determine public attitudes toward child poverty reported the following.

> Somewhat surprisingly, moral explanatory accounts of poverty were more common and powerful perceived causes of poverty: lack of responsibility, effort or family skills were universally cited explanations.... Most secure participants see children as deserving and their parents as less so (possibly unwitting agents of their children's misfortune).... Welfare recipients are seen in unremittingly negative terms by the economically secure. Vivid stereotypes (bingo, booze, etc.) reveal a range of images of SARs [social

> assistance recipients] from indolent and feeble to instrumental abusers of the system. Few seem to reconcile these hostile images of SARs as authors of their own misfortune with a parallel consensus that endemic structural unemployment will be a fixed feature of the new economy.[98]

Providing a role for human rights tribunals and courts in adjudicating and enforcing social and economic rights under human rights legislation is necessary to address many of the discriminatory consequences that flow from these attitudes. It is necessary to institutionalize domestic structures for adjudicating and enforcing these rights for the same reasons that it is necessary to adjudicate and enforce the rights currently protected in federal and provincial human rights legislation. The stereotypes and hostility toward poor women, (the vast majority of the undeserving "parents" described in the Ekos Research memorandum) and their lack of an effective political voice, invariably inform legislative drafting and decision making and, more fundamentally, decisions about the allocation of government resources.

The *Masse* case exemplifies what is at stake in the debate whether to extend domestic human rights protections to include social and economic rights. Low-income women in Ontario have not abandoned the democratic process. They have done everything they can through political and other means to address the increasingly hostile political climate they face in Ontario and elsewhere in Canada. The applicants in *Masse* went to court to argue that the decision to cut their welfare rates was not the result of any reasonable legislative consideration of competing resources, but was the result of governments catering to the public prejudices described in the Ekos Research memorandum. Evidence was clear that the cuts would cause massive increases in homelessness, in some instances, as noted by the Human Rights Committee, leading to death. Had the applicants in *Masse* been successful in their claim, much of the subsequent hardship and destruction of families could have been prevented, and the public would have been spared the long-term costs of poverty caused by the cuts.

The debate about the "justiciability" of social and economic rights is not simply an academic one. It is an issue with real consequences for low-income women, just as the absence of legal remedies to discrimination against pregnant women, domestic violence or harassment, and multiple discrimination had, and continues to have, very real consequences for women. Concerns about the composition, attitudes and institutional competence of the judiciary are well founded. However, they no more justify denying women recourse against violations of their fundamental social and economic rights, than they would justify denying women judicial remedies for other forms of discrimination and violence that they face. Similarly, concerns about legislative sovereignty are no more or less legitimate in the area of social and economic rights than in other areas in which women's human rights are violated. As the Supreme Court framed the question in *Vriend*,[99] how can a human rights regime which deprives low-income women of the human rights protections they are most in need of be consonant with Charter equality rights principles?

In *Andrews*, the Supreme Court drew on the reasoning of John Hart Ely to describe why, in a democratic system, it is the role of the courts to enforce equality rights. As Ely explained: "The whole point of the approach is to identify those groups in society to whose needs and

wishes elected officials have no apparent interest in attending. If the approach makes sense, it would not make sense to assign its enforcement to anyone but the courts."[100] Canadian courts continue to struggle with the question of how to decide which of the neglected "needs and interests" warrant judicial intervention, rather than deference. To date, the needs and interests of women in poverty have been ignored by human rights commissions, tribunals and courts. In our view, inclusion of social and economic rights in the CHRA will provide important guidance on how to balance judicial deference with the need to attend to the most pressing issues of inequality in the social and economic domain. Formal recognition of social and economic rights under the CHRA will, in short, ensure that the federal human rights regime can begin to respond to the real underlying issues of women's substantive inequality.

3. SOCIAL RIGHTS AND EQUALITY RIGHTS: TOWARD AN INTEGRATED APPROACH IN THE CHRA

The Movement Toward Domestic Protection of Social and Economic Rights

The historic neglect of social and economic rights in many countries, particularly of enforcement and legal remedies, has been based on the assumption that courts and tribunals lack the competence and the institutional legitimacy to review and provide remedies for governments' failures in the area of social and economic policy. In recent years, however, there has been a growing consensus within the human rights community that social and economic rights violations should be subject to improved complaints and adjudication procedures.[101] While some aspects of social and economic rights may not lend themselves to the same types of judicial remedies as civil rights violations, it is now widely recognized that there is an important role for courts, tribunals and human rights commissions in this area. The clear trend, internationally, is toward improved enforcement and petition procedures for social and economic rights.[102]

The 40-member Council of Europe, for example, in which Canada holds "observer" status, has recently adopted the revised *European Social Charter*, which came into force on July 1, 1999.[103] The revised Charter includes rights such as the right to decent housing, "protection against poverty and social exclusion" and "the right of mothers to social protection."[104] These rights are now subject to a complaints procedure through which non-governmental organizations may file complaints against governments and have them considered by a committee of independent experts.[105]

Canada has developed a particularly active partnership with South Africa in the area of human rights since the establishment of parliamentary democracy there. South Africa has a broad range of social and economic rights in its final constitution including the right "to have access to" "adequate housing," "health care services, including reproductive health care," "sufficient food and water" and "social security, including, if they are unable to support themselves and their dependents, appropriate social assistance."[106] Some components of these rights are subject to limitations related to available resources, but all aspects are subject to judicial review.[107] In the language of the final constitution, the state must take "reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights."[108] In some circumstances, it may also be possible to pursue social and economic rights claims against private actors.[109]

The South African Human Rights Commission has a broad mandate to promote and enforce all human rights, and to ensure compliance with international human rights treaties ratified by South Africa.[110] The Commission has been given a special constitutional responsibility with respect to social and economic rights. Each year, it must "require relevant organs of state to provide the Commission with information on the measures that they have taken towards the realization of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment."[111]

In light of initiatives in South Africa and elsewhere, it is evident that Canada risks falling seriously behind in the domestic protection afforded to internationally recognized human rights. With the exception of the United States, which has remained staunchly opposed to social and economic rights, the trend among Canada's international partners has been to develop improved social and economic rights guarantees.[112] It is now relatively rare for a country to have no domestic recognition of social and economic rights, either through the application of international treaties in domestic law or through constitutional or human rights provisions which refer to social and economic rights.[113] It would be a tragically missed opportunity if the current review of the CHRA, which is intended to carry the federal human rights regime forward into the 21st century, failed to deal with the absence of social and economic rights protections in Canada.

Why the CHRA Is the Appropriate Place to Begin in Canada

Adding social and economic rights to the CHRA would not provide a remedy for all the social and economic rights violations faced by women in Canada. As noted earlier, the Committee on Economic, Social and Cultural Rights has recommended the inclusion of social and economic rights in both provincial and federal human rights legislation. Indeed, many of the most important social rights claims of women fall within areas of provincial jurisdiction. And, inclusion of social and economic rights in human rights legislation is itself only part of the solution. In addition to incorporating social and economic rights in human rights statutes, the Committee has recommended a more expansive interpretation of Charter rights; a shared cost program for social assistance which restores a legally enforceable right to adequate financial assistance; and the protection of social and economic rights through the social union framework.[114] Thus, the incorporation of social and economic rights in the CHRA would represent only a partial fulfillment of Canada's overall obligation, under the ICESCR, to integrate social and economic rights into the domestic legal framework.

For a number of reasons, the CHRA is an ideal place to start the process of developing an approach to human rights in Canada that is more consistent with our international obligations and more responsive to the needs and human rights claims of Canada's most disadvantaged constituencies, particularly low-income women. First, including social and economic rights within the CHRA affirms their inherent connection with equality rights. Such a reform will encourage an interdependent approach to equality and social and economic rights in other areas, such as under the Charter and provincial human rights legislation. Formal recognition of the interdependence of equality and social and economic rights will focus social and economic rights challenges on the most critical issues of disadvantage for women, and on their inherent connection with women's equality. While the protection of social and economic rights through federal–provincial/territorial agreements is also important, such agreements are less likely to situate social and economic rights squarely within an equality rights framework.

As noted above, the Supreme Court of Canada has taken significant guidance from human rights tribunals on the proper approach to equality. One of the difficulties in advancing social rights claims under the Charter has been the lack of human rights jurisprudence to guide the courts on applying equality rights in a manner consistent with social and economic

rights. Including social and economic rights in the CHRA will promote the development of an equality jurisprudence that can be carried over to Charter claims within the social and economic sphere.

Second, including social and economic rights in the CHRA will encourage provincial human rights commissions and tribunals to address more effectively the social and economic rights claims of women and other disadvantaged groups under existing provincial human rights legislation. A dominant theme at the most recent meeting of the Canadian Association of Statutory Human Rights Agencies was that all human rights commissions in Canada should be devoting more attention to issues of poverty and social and economic rights.[115] The Quebec Commission has an express mandate to address social and economic rights under the Quebec Charter.[116] Other commissions have the ability to address poverty issues, at least insofar as they intersect with anti-discrimination guarantees and, under some provincial codes, with protection against discrimination based on receipt of public assistance, source of income or social condition.[117] Considerable work can therefore be done by all human rights commissions to develop policies on the positive measures required to ensure equality for social assistance recipients, single mothers and low-income women. Providing a clear mandate under the CHRA with respect to social and economic rights would promote such a collective effort.

Third, including social and economic rights in the CHRA as rights, subject to the complaints and adjudication procedure under the Act, will ensure they are not, in the words of the Committee on Economic, Social and Cultural Rights, "downgraded to principles and objectives."[118] The latter approach is more likely to prevail if social and economic rights are recognized only under federal–provincial/territorial agreements. As the repeal of CAP has shown, there is already a tendency in Canada to replace enforceable social program entitlements with unenforceable "shared principles and objectives."[119] This trend,[120] which has a particularly harmful impact on women,[121] would be reversed by incorporating social and economic rights into the CHRA.

Fourth, a procedure for claiming social and economic rights must respond to the needs of the most disadvantaged members of society. Human rights tribunals are more accessible, less expensive and less tied to legal procedures than are the courts. Advocates before human rights tribunals do not need to be lawyers, and tribunal members can be chosen for their expertise in human rights, without the requirement that they have formal legal training or accreditation. Women of colour, women with disabilities and other members of equality-seeking groups are better represented on human rights tribunals than on courts. Human rights tribunals will, therefore, provide a more accessible and responsive forum for the consideration of social and economic rights claims, and the development of a social and economic rights jurisprudence, particularly in the early stages of their evolution.

Fifth, the Canadian Human Rights Commission is Canada's "national human rights institution," with corresponding responsibilities and obligations.[122] The fact that the Commission's mandate has historically been restricted to non-discrimination rights is no defence for a failure to establish a national human rights institution in conformity with international norms. In 1991, a series of principles establishing minimum standards for

national human rights institutions was adopted by a UN-sponsored meeting of representatives of national human rights institutions in Paris. The Paris Principles were subsequently endorsed by the United Nations Human Rights Commission and the General Assembly, including Canada.[123] The Paris Principles provide that a national human rights institution shall have "as broad a mandate as possible" with particular responsibility "to promote and ensure the harmonization of national legislation regulations and practices with the international human rights instruments to which the State is a party, and their effective implementation."[124] Including social and economic rights in the CHRA, and expanding the mandate of the Canadian Human Rights Commission, is, therefore, necessary if the Canadian Human Rights Commission is to conform with the Paris Principles, as well as with the requirements of the ICESCR, as outlined in General Comment No. 10 with respect to national human rights institutions.[125]

Sixth, expanding the ambit of the CHRA and the role of the Canadian Human Rights Commission and Tribunal would ensure a better integration of domestic and international human rights review procedures, and a more coherent domestic response to the concerns of international human rights treaty-monitoring bodies. The Committee on Economic, Social and Cultural Rights, the Committee on the Elimination of Discrimination Against Women, and the Human Rights Committee have identified a number of critical issues of discrimination against social assistance recipients and low-income women in Canada.[126] These include:

- restricted access to civil legal aid;[127]
- the claw back of the National Child Benefit from social assistance recipients;[128]
- minimum income criteria, which disqualify low-income women and social assistance recipients from rental housing and mortgages;[129]
- workfare and the denial of the protections of labour relations law to workfare participants;[130]
- direct payment of social assistance to landlords;[131] and
- the damaging effect of welfare rate cuts,[132] including on access to housing.[133]

While only some of these issues fall squarely within federal jurisdiction, most engage the federal government at least as a joint actor. The Canadian Human Rights Commission could, with the appropriate mandate, encourage joint responses by federal, provincial and territorial human rights commissions to the concerns of international treaty-monitoring bodies. Some of the issues identified by the UN committees have been the subject of domestic human rights complaints and tribunal rulings. However, there has been no coherent response by Canadian human rights commissions regarding review and petition procedures at the international level. Human rights tribunals in Canada have generally ignored the fact that many of the issues raised in the poverty-related claims brought before them have also been the subject of concern at the international level.[134]

Seventh, adding social and economic rights to the CHRA will couple legal remedies for rights violations with institutional mechanisms for supporting and promoting these rights. Through its monitoring, investigation and education functions under the CHRA, the Canadian Human Rights Commission can provide a degree of institutional support that does not exist in the case of social and economic rights under federal–provincial/territorial agreements or in relation to the Charter. This institutional support will be particularly important at the early stages of integrating social and economic rights into Canadian law. As noted above, social and economic rights violations are inherently connected to discriminatory attitudes toward poor people, and toward poor women in particular. Promoting compliance with social and economic rights guarantees thus requires promotion of public attitudes which respect to the dignity and equality of people living in poverty, and public education campaigns to combat stereotypes and prejudice against low-income women. These are the traditional roles of human rights commissions. It is a significant advantage that the Canadian Human Rights Commission has recognized the importance of furthering protection for social and economic rights. The current chief commissioner has shown a strong interest in this area[135] and would be committed to initiating the necessary institutional transformations required to make the Commission effective.

Finally, while it is true that many social and economic rights issues fall within provincial jurisdiction, the CHRA is the appropriate place to begin to break down the jurisdictional divides that have become an increasingly serious obstacle to ensuring compliance with social and economic rights in Canada. The CHRA is the legislative statement of what are deemed to be the most fundamental human rights in Canada. The fact that housing, health services and income assistance fall primarily within provincial jurisdiction does not absolve the federal government of responsibility for violations of social and economic rights in these areas. There is no reason for our national human rights legislation to exclude rights to housing, health care and an adequate standard of living. Complaints and legal remedies to social and economic rights violations under the CHRA will, of course, be limited to areas in which the federal government is constitutionally permitted to act. Section 36 of the *Constitution Act, 1982*, makes it clear that federal and provincial governments both have a responsibility to ensure the equal enjoyment of social and economic rights in Canada, and the courts have held that the federal government is within its jurisdiction when it establishes enforceable standards in cost-shared social programs within provincial jurisdiction.[136] Increasingly, social and economic policy is developed jointly by federal, provincial and territorial governments through such bodies as the Federal/Provincial/Territorial Council. Any coherent approach to promoting and protecting social and economic rights in Canada will need to hold the federal government accountable to human rights standards in joint federal–provincial/territorial undertakings. Including social and economic rights under the CHRA will ensure that this federal responsibility is no longer ignored.

Including Social and Economic Rights in the CHRA

The foregoing discussion outlines the reasons why the CHRA is the appropriate place to begin to provide effective protection for social and economic rights in Canada. In this part of the paper we put forward a concrete proposal for doing so. First, we identify the substantive social and economic rights which must be included in the CHRA. Then, we explain how

new social and economic rights guarantees would relate to existing anti-discrimination provisions under the CHRA. We discuss the issue of defences to social and economic rights claims based on cost and other factors, and outline the specific obligations of Parliament and the federal government with respect to the implementation of social and economic rights. We go on to discuss the impact of the inclusion of social and economic rights under the CHRA on the interpretation of other federal laws and the Charter. We end by describing recommended modifications to the functions and responsibilities of the Canadian Human Rights Commission, and recommended changes to the role of the Canadian Human Rights Tribunal. At the outset of each section, model amendments to the CHRA are set out to provide a clear illustration of the proposed changes. The model social and economic rights amendment is reproduced in full in Appendix A.

What Social and Economic Rights Should Be Included in the CHRA?

> Rights Guaranteed
> 1. (1) Everyone has a right to adequate food, clothing, housing, health care, social security, education, work which is freely chosen, child care, support services and other fundamental requirements for security and dignity of the person.
>
> (2) These rights shall be interpreted and applied in a manner consistent with Canada's human rights treaty obligations and the fundamental value of promoting equality and alleviating social and economic disadvantage.

Any statement of social and economic rights under the CHRA should reflect and reiterate the fundamental social and economic rights recognized under international human rights agreements and treaties ratified by Canada. Express incorporation of these rights in the CHRA will:

- ensure better integration of domestic and international human rights commitments;
- achieve a significant measure of compliance with Canada's obligation to provide effective remedies for social and economic rights violations; and
- enable the Canadian Human Rights Commission, the Human Rights Tribunal and the courts to draw on international sources for guidance on the content and meaning of these rights.

In particular, the CHRA should expressly reaffirm the social and economic rights guarantees contained in the Universal Declaration,[137] adopted by the members of the UN General Assembly, including Canada, in 1948;[138] the ICESCR,[139] ratified by Canada, after lengthy discussions with the provinces, in 1976;[140] CEDAW,[141] ratified by Canada in 1982;[142] and the CRC,[143] ratified by Canada in 1992.[144] At a minimum, the CHRA should, therefore, guarantee a right to adequate food, clothing and housing, as well as a right to health care, education, social security and employment which is freely chosen. For women, it is also imperative that a right to child care and to social support services be expressly recognized, in view of the barriers which the lack of these services create for women's access to education, employment and economic equality.

The proposed wording of the statement of social and economic rights under the CHRA is similar to the language of the ICESCR. Thus, useful guidance on the legal scope and content of these rights can be found in the general comments adopted by the Committee on Economic, Social and Cultural Rights. The general comments describe the content of specific rights, such as the right to adequate housing[145] and the right to food;[146] the obligations with respect to particular groups, such as persons with disabilities[147] and older persons;[148] and the general nature of state party obligations, particularly with respect to the provision of legal remedies and the mandate of the national human rights institution.[149]

It is clear from the Committee's jurisprudence that the government's legislative and regulatory role is of paramount importance in giving effect to social and economic rights. Guaranteeing "the right to adequate housing," for example, does not require the state to provide universal housing.[150] In the Canadian context, the Committee's review of compliance with the right to housing has focussed not simply on the federal government's role in funding social housing programs, but also on the duty to ensure disadvantaged groups have access to housing in the private sphere: to prohibit discrimination in the rental market, to ensure adequate incomes and shelter allowances, to protect security of tenure, to better regulate rental housing conversions, and to provide support services for persons with disabilities.[151] To correct any notion that the state is obliged to be the primary provider with respect to social and economic rights, the South African Constitution adds the phrase "access to" before a number of substantive rights, such as the right to housing and the right to food. Given the historic approach of Canadian courts in this area, however, there is a risk the term "access" could be used to place undue limits on the substantive content of social and economic rights, and to restrict their justiciable aspect to their "negative" components.[152] The unqualified wording of the ICESCR is therefore preferred.

Prohibiting Discrimination in Relation to Social and Economic Rights

> Discriminatory Practice
> 2. It is a discriminatory practice to deny a right under s. 1 based on a prohibited ground of discrimination, or on a combination of prohibited grounds, including based on social condition.
>
> 3. A discriminatory practice under s. 2 may be the subject of a complaint and of an order under Part III of this Act, whether or not it may also be the subject of a complaint and of an order under this Part.

The mutually reinforcing relationship between social and economic rights and existing equality provisions under the CHRA should be clearly drawn. In keeping with the approach under the ICESCR and the CEDAW[153] (which explicitly recognize the fundamental interrelationship between social and economic rights and the equality rights of women and other disadvantaged groups), the CHRA should state expressly that social and economic rights are guaranteed without discrimination, including without discrimination based on sex and on social condition, among other grounds.[154]

It is arguable that a discriminatory denial of a social and economic right, or any other adverse differential treatment in relation to such a right, is already prohibited under the anti-

discrimination provisions of the CHRA, where the respondent falls within the jurisdiction of the Act. Section 5 of the CHRA states that:

> 5. It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public
>
> (a) to deny, or to deny access to, any such good, service, facility or accommodation to any individual, or
>
> (b) to differentiate adversely in relation to any individual, on a prohibited ground of discrimination.

Section 6 of the CHRA establishes a similar prohibition in relation to "the provision of...residential accommodation," and s. 7, in relation to employment. The phrase "services...available to the general public" has been interpreted by human rights tribunals[155] and courts[156] as including government programs and services. Section 5 of the CHRA, therefore, already prohibits the federal government from discriminating on the basis of sex or other enumerated grounds in the provision of federal social programs and services,[157] and in the application of federal legislation generally.[158] Section 6 of the CHRA prohibits discrimination by the federal government in the provision of housing,[159] and s. 7 prohibits discriminatory federal government employment practices.[160] Federally regulated industries and other public and private entities falling within the jurisdiction of the Canadian Human Rights Commission are also prohibited from engaging in discriminatory practices in the provision of goods, services, facilities, accommodation and employment.[161] So, for example, a discriminatory housing-related policy adopted by Canada Mortgage and Housing Corporation would be subject to review under s. 5, as would discrimination in the provision of health services within federal penitentiaries or other federal institutions. Similarly, a discriminatory practice under s. 7 of the CHRA would include discrimination by federally regulated industries in the provision of child care or housing benefits to their employees.

To ensure that existing equality guarantees under the CHRA effectively apply in the area of social and economic rights, the CHRA should state expressly that a denial of a social and economic right on a prohibited ground of discrimination constitutes a discriminatory practice within the meaning of the Act. Victims of a discriminatory denial of a social and economic right or of adverse treatment in relation to such a right, should have a clearly articulated right to pursue a complaint through the procedures set out under Part III of the CHRA, where such a complaint falls within the jurisdiction of the Act. Defining a discriminatory practice within the CHRA as including a discriminatory denial of a social or economic right would avoid the situation described in the previous section of the paper, of a discrimination complaint being dismissed because it raised a poverty-related issue linked with the denial of a social and economic right.[162]

Like the existing prohibitions under Part I of the Act, the prohibition against discrimination in relation to social and economic rights must apply to practices that are both directly and systemically discriminatory. Adverse effect analysis in relation to social and economic rights will allow tribunals to assess whether policies or practices, including acts of

"omission," result in the denial of a social and economic right to a group identified by a prohibited ground of discrimination. As LaForest, J. noted in *Eldridge,* with respect to the failure to provide publicly funded interpretation services: "the adverse effects suffered by deaf persons stem not from the imposition of a burden not faced by the mainstream population, but rather from a failure to ensure that deaf persons benefit equally from a service offered to everyone."[163] Such an analysis, applied to the enjoyment of social and economic rights generally, incorporates the approach to violations of social and economic rights, developed at the international level, which places a particular priority on obligations toward the most disadvantaged. Thus, a failure to address adequately the needs of vulnerable groups could be challenged as a form of adverse effect discrimination in relation to the enjoyment of social and economic rights.

In addition, for a prohibition against discrimination in relation to social and economic rights to be effective, it is imperative that "social condition" be added to the CHRA as a prohibited ground of discrimination. While a full review of this issue is beyond the scope of this paper,[164] it is clear that the omission of social condition from the proscribed grounds of discrimination under the CHRA leaves the legislation relatively powerless to address the kinds of discriminatory attitudes described in the Ekos Research memorandum,[165] and the exclusionary results of policies and practices that fail to address inequalities resulting from poverty. The Committee on Economic, Social and Cultural Rights has made it clear it regards protection from discrimination based on receipt of public assistance or low income as falling within the rubric of discrimination on the basis of "social origin, property, birth or other status" which Canada is obliged to prohibit in domestic legislation. The Committee has recommended the inclusion of "social or economic status" as a prohibited ground of discrimination in the CHRA.[166]

For similar reasons, it is important that the *Indian Act* exemption under s. 67 of the CHRA not apply in the area of social and economic rights.[167] In its concluding observations in 1998, the Committee on Economic, Social and Cultural Rights made particular note of the situation of Aboriginal peoples in relation to the equal enjoyment of ICESCR rights. The Committee stated:

> The Committee is greatly concerned at the gross disparity between Aboriginal people and the majority of Canadians with respect to the enjoyment of Covenant rights. There has been little or no progress in the alleviation of social and economic deprivation among Aboriginal people. In particular, the Committee is deeply concerned at the shortage of adequate housing, the endemic mass unemployment and the high rate of suicide, especially among youth in the Aboriginal communities. Another concern is the failure to provide safe and adequate drinking water to Aboriginal communities on reserves. The delegation of the State Party conceded that almost a quarter of Aboriginal household dwellings require major repairs for lack of basic amenities.[168]

In its 1999 concluding observations, the Human Rights Committee was equally critical of Canada's performance under the ICCPR, noting that "as the State party acknowledged," the situation of Aboriginal peoples remains "the most pressing human rights issue facing Canadians.[169] While the general issue of the applicability of the CHRA to the *Indian Act* is beyond the scope of this paper, it is clear that Aboriginal women are among the most socially and economically disadvantaged groups in Canadian society.[170] Aboriginal women and their families, whether living on or off reserve, experience severe and systemic deprivations of the most basic social and economic rights including, as the Committee on Economic, Social and Cultural Rights observed, the right to safe drinking water and to adequate housing. Social and economic rights guarantees under the CHRA must prohibit discrimination against Aboriginal people to the same extent as against other disadvantaged groups in Canadian society, irrespective of whether that discrimination results from the application of the federal *Indian Act,* or from other laws or policies.

The proposed prohibition against discriminatory denials or adverse treatment in relation to social and economic rights will also allow certain types of complaints against private respondents. The amendment would not, in fact, create an entirely new ground for complaints, since discriminatory practices are already prohibited under the CHRA. It would, however, change the focus of some inquiries to highlight social and economic rights as they intersect with discrimination issues, and it would require an assessment of the nature of the obligations imposed on respondents in light of the importance of social and economic rights. For example, the bank policy which disqualifies mortgage applicants paying more than 30 percent of their income toward essential housing costs, could be challenged under the current provisions of the CHRA for its discriminatory impact on women, particularly single mothers who have lower incomes and must pay more for housing.[171] However, under the CHRA as it is presently framed, there is nothing to encourage the Tribunal to give particular weight to the fact that the banks' mortgage lending policy might result in the denial of access to adequate housing for rural women with children, who cannot easily obtain rental housing. In principle, the CHRA applies to a denial of credit necessary to obtain housing in the same way as it applies to a denial of a loan for a sports car.[172] Without limiting, in any way, the general application of the anti-discrimination guarantees under the CHRA, the inclusion of a right to housing and an express prohibition against discrimination in relation to this right would encourage a tribunal inquiry into the banks' mortgage lending practices to consider broader issues relating to women's access to adequate housing. Similarly, the banks' obligations under the CHRA would also be assessed in relation to the importance of this right.

Justifying Discrimination in Relation to Social and Economic Rights

> Exception
> 4. (1) A discriminatory practice under s. 2 includes any policy or practice which results in the denial of a right under s. 1 to any disadvantaged individual or group, unless such a denial is reasonable and bona fide considering health, safety and cost.
>
> (2) For a discriminatory practice under s. 2, by the Crown or an agency of the Crown, to be reasonable considering cost, its objective must be sufficiently important to warrant overriding a s. 1 right; it must be rationally connected to its

objective; it must impair the right as little as possible; and its effects must be proportionate to its objective, considering the principles under s.1.

The permissible defences to a complaint that a social or economic right has been denied on a prohibited ground of discrimination should be stated explicitly under the CHRA. Section 15(1) of the Act now provides that a practice will not be found discriminatory if there is a reasonable and bona fide justification for it. For a practice to be deemed to have a reasonable and bona fide justification under s. 15(2), "it must be established that accommodation of the needs of an individual or a class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost."

In the case of private respondents, the "reasonable and bona fide" standard applied to discriminatory practices in other areas would also apply to discrimination in relation to social and economic rights. In the example mentioned above, of a challenge to lending restrictions that disproportionately deny mortgages to women, the banks may be required to alter their credit restrictions or to develop housing loan programs for low-income women, where such measures would not impose an "undue hardship." The standard for undue hardship with respect to private respondents is an evolving one. It is significant, however, that in its decision in *Central Okanagan School District No. 23* v. *Renauld,* the Supreme Court of Canada explicitly rejected the *de minimus* economic test applied by the United States Supreme Court in *Trans World Airlines Inc.* v. *Hardison.*[173] The Court stated that "the use of the term "undue" infers that some hardship is acceptable; it is only "undue" hardship that satisfies this test."[174] Boards of inquiry have taken this to mean that, in order to remedy discrimination, substantial expenses may be imposed on private respondents, relative to the resources available to them.[175]

In the case of government respondents, however, the issue of cost as a defence to discrimination is more complex, not only because government resources are virtually unlimited, but because governments are generally balancing competing demands in making any social or economic policy choice. Neither the Canadian Human Rights Tribunal nor the courts have squarely addressed the cost justification under s. 15(2) of the CHRA with respect to governments' obligations under the Act. As an employer, the government will likely be held to the same standards as the private sector.[176] It is more difficult to assess the notion of "undue hardship" with respect to broader obligations of governments to address disadvantage through social programs and other measures.

In approaching the issue of cost as a justification for social or economic rights violations under the CHRA, it is helpful to consider the way in which the Supreme Court of Canada has dealt with the issue of cost as a defence under the Canadian Charter. The Court has consistently held that financial considerations alone cannot justify a rights violation under s. 1.[177] The Court has required, instead, that governments comply with the requirements set out in the *Oakes*[178] case. First, the governmental objective is sufficiently important to warrant overriding an individual right and, second, the means chosen to pursue that objective are rational, the individual right is impaired as little as possible and the benefit resulting from the rights violation outweighs the harm. The Court has been clear that an

objective which is itself discriminatory cannot be considered pressing or substantial within the meaning of s. 1, and, hence, cannot justify a violation of a Charter right.[179]

In the *Eldridge* case, where the Court first adopted a clear position that positive measures may be required under s. 15 of the Charter, LaForest, J. asserted that any defence analogous to an "undue hardship" standard of reasonableness under human rights legislation should be put forward under s. 1, and should not be used to restrict the ambit of s. 15.

> The obligation to make reasonable accommodation for those adversely affected by a facially neutral policy or rule extends only to the point of "undue hardship"; see *Simpsons-Sears*, *supra*, and *Central Alberta Dairy Pool*, *supra*. In my view, in s. 15(1) cases this principle is best addressed as a component of the s. 1 analysis. Reasonable accommodation, in this context, is generally equivalent to the concept of "reasonable limits". It should not be employed to restrict the ambit of s. 15(1).[180]

Rather than leaving the reference to cost under s. 15 of the CHRA undefined in relation to discrimination by government in areas of social and economic rights, the proposed amendments incorporate the existing standard of review under s. 1 of the Charter. Such a formulation of the cost defence under the CHRA will help to foster an approach to social and economic rights under human rights legislation which reflects and can, in turn, inform rights claims under the Charter. This approach will also counter the existing trend in the lower court jurisprudence, which has essentially held that where cost or the allocation of resources is an issue, the courts have no role in enforcing equality rights in government programs. Instead, the proposed amendment imposes a rigorous requirement on the federal government to justify, in a principled way, any discriminatory denial of social and economic rights based on cost.

Government Obligations in Relation to Social and Economic Rights

> Obligation of Parliament and the Government of Canada
> 5. (1) Parliament and the Government of Canada have an obligation to take steps, to the maximum of available resources, with a view to achieving progressively the full realization of the rights under s. 1 by all appropriate means, including taxation and fiscal policies, equalization payments, funding of shared cost programs, negotiation of federal–provincial/territorial and international agreements, and other legislative and regulatory measures, in accordance with Canada's international human rights treaty obligations and s. 36 of the *Constitution Act, 1982*.
>
> (2) This obligation shall be carried out in a manner which recognizes the distinct needs and particular disadvantages facing low-income women and ensures women's security and promotes their social and economic equality.

As discussed in Chapter 1, it is clearly established under the human rights treaties ratified by Canada that the federal government has particular obligations in relation to the implementation of social and economic rights. These include the obligation to take necessary measures to ensure that such rights are enjoyed equally by the most vulnerable and disadvantaged members of Canadian society. This obligation is articulated most clearly

under Article 2(1) of the ICESCR, which sets out the government's responsibilities in the following terms.

> Each State Party to the present Covenant undertakes to take steps...to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

In terms similar to the ICESCR, Article 4 of the CRC provides that state parties "shall undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention" and that "[w]ith regard to economic, social and cultural rights, State Parties shall undertake such measures to the maximum extent of their available resources...." Article 2 of the CEDAW commits state parties to taking "all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women." Article 3 of the CEDAW provides that state parties "shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men."

The particular obligations of the federal government in relation to social and economic rights are reinforced by the language of s. 36 of the *Constitution Act, 1982*.[181] It entrenches an express commitment by Parliament and the Government of Canada to "promoting equal opportunities for the well-being of Canadians," "furthering economic development to reduce disparity in opportunities" and "providing essential public services of reasonable quality to all Canadians." Social and economic rights guarantees under the CHRA should reflect the governmental obligations under the ICESCR and other human rights treaties ratified by Canada, as well as the federal government's constitutional commitments under s. 36.

The concept of "progressive realization" and the standard of "the maximum of available resources" provide important guidance as to the nature of the government's responsibility to take positive measures to "fulfil" social and economic rights. Progressive realization recognizes that some components of social and economic rights are realized over time. It does not, however, offer governments a blanket defence of "incrementalism." As stated in the Maastricht Guidelines on Violations of Social and Economic Rights, "the fact that the full realization of most economic, social and cultural rights can only be achieved progressively, which in fact also applies to most civil and political rights, does not alter the nature of the legal obligation of states which requires that certain steps be taken immediately and others as soon as possible."[182] Or, as the Committee on Economic, Social and Cultural Rights explains in its General Comment No. 3 on the nature of state parties' obligations under the ICESCR, governments must demonstrate that they have taken steps that are "deliberate, concrete and targeted as clearly as possible towards meeting the obligations" and they have an obligation "to move as expeditiously and effectively as possible towards

that goal."[183] Where the realization of certain components of a social or economic right is left for a future date, governments may be required to show that they have developed strategic plans to work toward meeting their obligations in full. Thus, the right to food requires that a "national strategy" be adopted to ensure food and nutrition security for all, and the right to housing requires a "national housing strategy."[184] Under the terms of the ICESCR, these are clearly obligations of the federal government, notwithstanding that housing and food security are largely matters of provincial jurisdiction.

The "maximum of available resources" standard includes, but is not limited to, budgetary resources. This standard can include other types of resources as well, such as human, technological and natural resources.[185] A review of whether the government has satisfied this standard will necessarily consider competing demands on budgetary resources, and the extent to which allocating resources in one area will impact the enjoyment of rights in others. For example, in the first case to deal with the "maximum available resources" standard under the new South African Constitution, the Constitutional Court of South Africa observed that:

> In some instances, the Constitution states in so many words that the state must take reasonable legislative and other measures, within its available resources "to achieve the progressive realization of each of these rights." In its language, the Constitution accepts that it cannot solve all of our society's woes overnight, but must go on trying to resolve these problems. One of the limiting factors to the attainment of the Constitution's guarantees is that of limited or scarce resources.[186]

Thus, the Court was required to consider, not only the needs of the individual applicant, but also "those who need access to housing, food and water, employment opportunities, and social security."[187]

The inclusion in the CHRA of a "maximum of available resources" standard for the realization of social and economic rights does not prevent the federal government from invoking competing demands for public spending as a justification for its failure to meet its social and economic rights obligations in a particular area. It does, however, give necessary direction to tribunals and courts that the existence of budgetary considerations and the necessity of balancing competing claims on resources do not justify absolute deference to Parliament. Rather, decisions involving competing resources must be subject to some degree of scrutiny. As a general rule, the focus of tribunal or court scrutiny will be on the most vulnerable groups in society, and on those deprived of the "minimum essential elements" of the right. In such cases, the Committee on Economic, Social and Cultural Rights has indicated that a government will have a more onerous burden in meeting the "maximum of available resources" standard. A government will be required to demonstrate "that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations."[188]

The Committee has also indicated that a more rigorous standard of review will be applied to what it characterizes as a "deliberately retrogressive measure" with respect to the realization

of social and economic rights. While legislative and policy approaches to realizing social and economic rights will be continuously reviewed and revised, it will be very difficult for governments to show that they are in compliance with the ICESCR if they deliberately move backward. Removing important legislative protections for disadvantaged groups, for example, without putting new ones in their place, would constitute a deliberately retrogressive measure. Such action "would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum of available resources."[189]

The proposed amendments to the CHRA identify a number of "appropriate means" through which the federal government must pursue the progressive realization of social and economic rights. These include taxation and fiscal policies, equalization payments, funding of shared cost programs, negotiation of federal–provincial/territorial and international agreements, and other legislative and regulatory measures. This expansive approach to the nature of the federal government's social and economic rights obligations is necessary to deal with what the Committee on Economic, Social and Cultural Rights identified as a primary obstacle to the implementation of the Covenant in Canada: a "complex federal system" and a reliance on "political processes" with provinces to negotiate implementation in areas of provincial jurisdiction.[190] Notwithstanding the growth of federal–provincial/territorial agreements, negotiations and consultations in areas of social and economic policy, it is the federal government which is ultimately responsible for ensuring compliance with the ICESCR and other international human rights treaties ratified by Canada. Article 28 of the ICESCR provides that its provisions "shall extend to all parts of federal States without any limitations or exceptions." The constitutional division of powers between the federal and provincial governments cannot justify a failure to ensure compliance.[191] Thus, the obligations of Parliament and the Government of Canada with respect to the progressive realization of social and economic rights must include all the legislative, regulatory and policy instruments available to the federal government for the promotion, protection and fulfilment of social and economic rights.

The federal government's responsibility to comply with the progressive realization of the right to adequate housing, for example, should extend well beyond its direct responsibility for housing provided by the Royal Canadian Mounted Police or the Department of National Defence. It should also include accountability for many of the issues of non-compliance identified by the Committee on Economic, Social and Cultural Rights. These include:

- changes in levels and conditions of federal funding of provincial social housing programs;
- the failure to address substandard housing conditions for Aboriginal peoples living on and off reserves;
- the failure to adopt a national strategy to deal with homelessness;
- the failure to establish a national poverty line;

- the failure to attach conditions to federal funding of provincial social assistance programs;

- the failure to ensure access to adequate housing; and

- the failure to allocate sufficient resources to address poverty among women, among other housing-related issues.[192]

Interdependence of Rights

> 6. Federal laws, regulations, policies and practices shall be interpreted and applied in a manner consistent with the rights under s. 1 and the obligation under s. 5, and with the fundamental value of promoting equality and alleviating social and economic disadvantage.
>
> 7. Nothing in this Part limits or diminishes the rights or obligations contained elsewhere in this Act or in the *Canadian Charter of Rights and Freedoms*.

Apart from direct incorporation of social and economic rights guarantees into the CHRA, considerable protection of social and economic rights can be achieved through interpretation and application of federal laws and regulations, and through the appropriate exercise of administrative discretion. By the same token, serious violations of social and economic rights can occur through delegated decision making and through the application of legislation and regulations in a manner inconsistent with social and economic rights guarantees. As the cases discussed in Chapter 2 illustrate, many of the decisions which bear most heavily on the lives of women living in poverty are the result of the exercise of discretion by governmental and quasi-governmental officials, such as social program administrators. Ensuring that such decision making respects social and economic rights principles would be an important step toward remedying many of the injustices low-income women are currently forced to challenge through the courts.

In its decision in *Baker*, the Supreme Court ruled that federal laws should be applied consistently with the international human rights treaties Canada has ratified.[193] However, an express statement of this interpretive principle should be included under the CHRA. In addition to increasing administrative and judicial awareness of the need to interpret domestic legislation in accordance with international human rights guarantees, including such an interpretive clause under the CHRA will mitigate the concern of the minority of the Court in *Baker* that according this degree of authority to unincorporated treaties would circumvent parliamentary sovereignty.[194]

The second part of the proposed interdependence provision is required to ensure that inclusion of social and economic rights in the CHRA will not indirectly reduce the scope of Charter rights or the effectiveness of existing equality guarantees in the CHRA. Including social and economic rights in the CHRA as a separate category with a distinct enforcement mechanism, could, in the absence of a direction otherwise, be taken by tribunals and courts to mean that any rights claims with a social or economic component could only be considered under the new social and economic rights provisions of the CHRA. This might discourage courts and tribunals from dealing with issues of discrimination in social benefit

programs, or from addressing other poverty-related issues under the Charter or under existing human rights guarantees. The *Eldridge* case, for example, was both an equality claim with respect to a public service and a claim to the equal enjoyment of the right to health care.[195] Given the fundamental interdependence of equality and social and economic rights, protection of social and economic rights should not be limited to a single forum or remedial avenue. The proposed interpretive clause would dissuade tribunals and courts from using the new social and economic rights provisions under the CHRA as a basis for weakening any existing rights under the Charter or human rights legislation, and would encourage a greater appreciation of the interdependence and indivisibility of all human rights as well as a new responsiveness in all areas of law to the substantive equality issues linked with poverty.

The Role of the Human Rights Commission

Social Rights Sub-committee

8. A social rights sub-committee of the Human Rights Commission, consisting of at least three full-time members with demonstrated experience in the area of social and economic rights, shall be responsible for evaluating and promoting compliance with this Part.

9. In particular, the social rights sub-committee shall:

(a) establish and revise standards according to which compliance with the rights under s. 1 can be measured;

(b) submit recommendations to appropriate government and private sector bodies on measures necessary to promote, respect, protect and fulfil the rights under s. 1;

(c) evaluate government compliance under s. 5, including through review of federal laws, regulations, policies and practices;

(d) promote the production, exchange and dissemination of information and statistics on the social and economic circumstances of individuals with respect to the rights under s. 1, especially of those who are members of disadvantaged groups;

(e) encourage and facilitate government and private sector consultation with non-governmental organizations representative of disadvantaged groups with respect to the rights under s.1;

(f) collaborate with similar bodies or authorities at the provincial and international level;

(g) respond to any request for information or invitation to intervene from the social rights panel;

(h) have the right to intervene in any proceedings before the social rights panel;

(i) report annually on the progress which has been made in achieving the objectives under this Part; and

(j) carry out any other task that is necessary or appropriate for the purpose.

10. With respect to Canada's international reporting obligations relating to the rights under s. 1, the Sub-committee shall, in addition:

(a) encourage relevant government bodies to consult with non-governmental organizations representative of disadvantaged groups in the preparation of Canada's reports;

(a) disseminate the findings and recommendations of international treaty-monitoring bodies relating to Canada's reports;

(b) organize periodic meetings of relevant government bodies and non-governmental organizations to discuss the measures taken by Canada in response to such findings and recommendations; and

(c) submit independent opinions on issues of compliance with social and economic rights in international treaties ratified by Canada, on its own initiative or on request, where appropriate.

11. The social rights sub-committee shall respond to any request for information or invitation to intervene from the social rights panel, and the sub-committee shall have the right to intervene in any proceedings before the panel.

The current mandate of the Canadian Human Rights Commission under s. 27 of the CHRA includes most of the activities necessary for the effective promotion of social and economic rights at the federal level. Transforming the role of the Commission with respect to poverty and social and economic rights is, therefore, primarily a matter of expanding the ambit of the rights protected under the CHRA, rather than redefining the powers, duties and functions of the Commission. In addition to its duties under Part III of the Act with respect to complaints, the Commission currently has the mandate to engage in public education and research on issues of compliance with the CHRA, establish close liaison with provincial human rights commissions to foster common policies and deal with areas of overlapping jurisdiction, consider and comment on recommendations concerning human rights from any source,[196] conduct studies and issue recommendations.

Two changes must be made to the present mandate of the Commission, however, in order to enable it to meet the requirements of the Paris Principles and to carry out the duties of a national institution under the ICESCR. Both the Paris Principles and General Comment No. 10 require the Commission to have an explicit mandate to review legislation.[197] As it is presently formulated, the CHRA permits the review of "regulations, rules, orders, by-laws and other instruments made pursuant to an Act of Parliament" but does not expressly provide for review of legislation or draft legislation. In addition to the power to review domestic legislation, both the Paris Principles and General Comment No. 10 require that the Commission have the mandate to consider domestic compliance with international human rights treaties which Canada has ratified.[198] While the Commission's current mandate under s. 27 of the CHRA could be read as including this power, the Commission's role in

reviewing Canada's compliance with human rights treaties should be explicitly included among the Commission's duties and functions.

The Paris Principles also suggest that national human rights institutions may play a role in the reporting process before UN treaty-monitoring bodies, although the precise nature of that role is not clearly set out.[199] The Committee on Economic, Social and Cultural Rights does not include this as one of the required activities of a national human rights body under General Comment No. 10. In view of the increasingly "adjudicative" approach of the Committee to state party review under the ICESCR, it would be inappropriate for the Human Rights Commission to represent, or to speak on behalf of, the Canadian government. Submitting an independent opinion on matters of compliance would be more appropriate. However, it is essential that the Commission remain independent of government in the treaty-monitoring review process. In its 1998 review of Canada's performance under the ICESCR, the Committee requested the independent opinions of federal and provincial human rights commissions on a number of matters within their area of expertise, including whether workfare programs discriminate against welfare recipients, the effect of changes to the Ontario *Human Rights Code* which permit income discrimination and whether social condition should be added as a prohibited ground of discrimination under Canadian human rights statutes.[200]

Rather than simply adding to the already heavy responsibilities of the Human Rights Commission, the proposed amendments would create a special social rights sub-committee, with responsibility for promoting compliance with social and economic rights.[201] The creation of a specialized sub-committee enables the Commission to draw on specific expertise in the social and economic rights area, and ensures that a specialized unit within the Commission can focus on social and economic rights exclusively. Under the proposed amendments, the social rights sub-committee would not play a role in relation to the filing of complaints. Rather, complaints not falling within the anti-discrimination provisions of Part III of the CHRA would be submitted directly to the social rights panel, as described below. The sub-committee would have the right to intervene in any case that is heard before the social rights panel, but it would not have the power to screen complaints, or to decide which complaints should go forward to the Tribunal. In the area of social and economic rights in particular, the entity responsible for promoting compliance with social and economic rights obligations must be free from any requirement to remain neutral with respect to the outcome of complaints. The duties and functions of the proposed social rights sub-committee include effective liaison with non-governmental organizations which may also be parties under the complaints procedure. It is important that the sub-committee be liberated from the constraints that go with any role in the evaluation or processing of complaints, in order to be an effective social and economic rights advocate within the Commission, within government and at a broader public level.

The Role of the Canadian Human Rights Tribunal

Social Rights Panel

12. A social rights panel of the Human Rights Tribunal, consisting of at least three full-time members with demonstrated experience in the area of social and economic

rights, shall be responsible for inquiring into complaints that the government has infringed a right under s. 1 or failed to meet its obligation under s. 5.

13. (1) Any individual or group whose members are directly affected may submit a written complaint to the panel that the government has infringed a right under s. 1 or failed to meet its obligation under s. 5.

(2) On receipt of a complaint, the panel shall decide if it will hold a hearing into the complaint, and if so, it shall conduct the hearing in accordance with the procedures under Part III of the Act.

14. (1) Following the hearing into a complaint under s. 13, the panel shall issue a decision whether or not the complaint is justified.

(2) Where the Panel decides that a complaint is justified, it shall:

(a) hear submissions from the complainant and the government regarding the measures required to achieve compliance with s. 1 or s. 5, and regarding the time required to carry out such measures; and

(b) make an order that the required measures be taken within a specified period of time, including an order requiring the amendment of any federal law, regulation, policy or practice.

15. (1) In lieu of making an order under s. 14, the panel may, where appropriate, order that the government report back by a specified date on measures taken or proposed to be taken which will achieve compliance with s. 1 or s. 5.

(2) On receipt of a report, the panel may make a further order under sub-section (1) or it may make an order under s. 14.

16. An order under s. 14 shall not come into effect until the House of Commons has sat for at least eight weeks, during which time the order may be overridden by a simple majority vote of Parliament. The government may indicate its acceptance of the terms of the order prior to the expiry of the time period specified in the order.

17. On coming into effect, an order under s. 14 may, for the purpose of enforcement, be made an order of the Federal Court by following the usual practice and procedure.

As noted above, the inclusion of social and economic rights in the CHRA, and the prohibition against discriminatory practices resulting in the denial of social and economic rights, will bring many of women's social and economic rights claims within the ambit of the existing equality guarantees of the CHRA. These claims are subject to the regular complaints procedure under Part III of the Act, and, if referred to a tribunal by the Human Rights Commission, will be heard in the same manner as other discrimination complaints.[202]

There is no necessity for the Tribunal's functions or powers to be revised in order to deal with these anti-discrimination complaints. As suggested above, it is rather a matter of expanding the scope of the rights in the Act.

The proposed amendments in relation to the Tribunal would provide an additional complaints and adjudication procedure, before a specialized social rights panel of the Tribunal, in relation to any alleged failure on the part of Parliament or the Government of Canada to meet its obligations to "take steps, to the maximum of available resources, with a view to achieving progressively the full realization of the rights." Complaints of this nature would not be filed with the Human Rights Commission, but would be submitted directly to the social rights panel. On receipt of a complaint, the panel would have the power to decide if a hearing should be held. Thus, whatever the outcome of the current CHRA review with respect to direct access to the Tribunal for discrimination complaints under Part III of the CHRA, complaints under the new social and economic rights provisions relating to the obligations of the federal government would be processed under a separate procedure. While all such complaints would be received, in written form, by the social rights panel, they would not necessarily be granted a full hearing or be adjudicated. This alternative to the selection of complaints for adjudication, in relation to the failure of the federal government to meet its specific social and economic rights obligations, is based on the idea that the adjudication procedures in this area would function as an important complement to the parliamentary process, rather than providing an individualized legal remedy in the more traditional sense.[203]

It must be emphasized that the creation of a special procedure for social and economic rights claims involving the obligations of government is not meant to suggest social and economic rights claims are inherently different from other types of rights claims and, therefore, ought to be subject to a different model of adjudication. Many social and economic rights claims will continue to be advanced by way of the equality provisions of the CHRA, under the Charter, and through the interpretation and application of other legislation consistent with international social and economic rights principles. Establishing a social rights panel creates a supplementary adjudication procedure, designed to hear certain types of social rights claims related to progressive realization and to facilitate public review of whether the federal government has complied with its obligations, under s. 5 of the proposed amendments, to promote and fulfill social and economic rights "by all appropriate means" and "to the maximum of its available resources."

The cases heard by the social rights panel will generally relate to issues of national importance, and involve systemic issues affecting the rights of many individuals and groups. The proposed complaints procedure is designed to ensure that those who suffer harm as a result of the government's failure to act in accordance with its social and economic rights obligations, including the obligation of "progressive realization," are able to bring issues to the attention of the public and the government, and have these issues considered as matters of high priority. Complaints can be brought before the social rights panel by individuals directly affected by the government's failure to meet its obligations, or by organizations representing those affected.

Thus, an allegation that the federal government has failed to take action, required under s. 5 of the proposed amendments, to address homelessness could be brought either by individuals who are homeless or by an appropriate non-governmental organization. The

focus of the panel's inquiry would not generally be on providing individualized remedies or compensation for the complainants who bring the issue forward. Rather, the review process would examine the more general question of whether the government is meeting its broad obligation to realize the right to housing. Where urgent remedial issues were at stake, those affected would need to rely on other means of vindicating their rights. For example, if the right to housing were being infringed by an eviction, action would have to be taken under residential tenancies laws or the Charter, relying on the right to housing under the CHRA as an interpretive guide in dealing with the eviction complaint.

Under the proposed amendments, the social rights panel has the ability to place critical issues of social and economic rights on the parliamentary agenda. The panel may either order the government to report back on measures that will be taken to comply with the CHRA, or make a remedial order which does not take effect until the House of Commons has sat for eight weeks, during which time Parliament may override the panel's order. To preserve the effectiveness of this remedy, it is important that the panel be empowered to be selective in choosing the issues it addresses, both in light of its own limited resources, and in view of its ability to place issues directly before Parliament, through its remedial orders. It is not envisioned that the social rights panel would rule on a large number of complaints in a year. Rather, it would select cases of national and jurisprudential importance in a manner somewhat analogous to the consideration of leave to appeal applications by the Supreme Court of Canada.

Hearings before the social rights panel, will play an important function in allowing disadvantaged groups and individuals to tell their stories while, at the same time, provoking thorough public review of critical issues related to access by disadvantaged groups to housing, health care, education, child care, employment and support services. It is to be hoped the government will recognize the complaints process before the social rights panel as a valid and important forum for social policy review, as an aid to strategic prioritization of social and economic issues within a domestic and international human rights framework, and as an opportunity to promote greater transparency of social and economic policy making. The social rights panel hearing process will also promote greater public awareness and support for social and economic rights and so may, indirectly, assist the federal government in securing agreement from provinces for joint action to address violations.

By giving Parliament the authority to override any order of the social rights panel, the amended CHRA would place an onus on the panel to earn and to maintain the respect of the public and of Parliament. For low-income women and other victims of social and economic rights violations, the availability of the panel's complaint process is ultimately a mechanism for ensuring a "dialogue" with Parliament, and for providing a more effective avenue for democratic participation in the social and economic policy-making process.[204] The social rights panel complaint process will enable complainants to present evidence in a public forum, on issues which might otherwise receive little public attention.[205] Whether or not complainants achieve the remedy they seek from Parliament will depend, to some extent, on the success of the established "dialogue." If the panel, its decision-making process and its decisions have the respect of the public, it will be difficult for Parliament to exercise its override power and to ignore the rights violations the panel has identified. And, while the

parliamentary override may appear to weaken the panel's remedial powers, this limit will ensure that the panel is granted unrestricted authority to consider issues that have previously been the subject of excessive judicial deference. As the Supreme Court's decision in *Vriend* demonstrates, courts and tribunals are more comfortable in finding rights violations in the area of positive obligations when they are able to rely on the "ultimate parliamentary safeguard" of a legislative veto.[206]

4. CONCLUSION

Including social and economic rights in the CHRA is not simply a question of achieving compliance with international human rights law or greater consistency with the approach to Charter interpretation advocated by the Committee on Economic, Social and Cultural Rights and increasingly accepted by the Supreme Court of Canada. Nor is it a matter of bringing our national human rights institution into closer conformity with the ICESCR and the Paris Principles. Rather, it is about creating a federal human rights regime that recognizes and validates the substantive claims to dignity and equality advanced by the most disadvantaged women in Canadian society—women living in poverty, women of colour, young mothers, elderly women, women with disabilities and other women facing multiple obstacles to substantive equality.

When Lynn Bluecloud, an Aboriginal woman who was five months pregnant—one of approximately 6,000 homeless people in Ottawa—died of hypothermia near the Rideau Canal, almost in the shadow of Parliament Hill,[207] many Canadians understood that fundamental human rights issues were being ignored in our country. UN human rights treaty-monitoring bodies have pointed to the connection between dramatic increases in homelessness among women and recent decisions at the federal level, such as the repeal of CAP and the cancellation of federal funding for social housing.[208] A few days after Ms. Bluecloud's death, the United Nations Human Rights Committee expressed concern that homelessness in Canada "has led to serious health problems and even to death," and recommended that the government take "positive measures required by article 6 [the right to life] to address this serious problem."[209] The consternation and dismay expressed by members of various UN committees that Canada, considered so exemplary in the field of human rights, is allowing this to happen, is shared by many Canadians. It is wrong to assume that social and economic rights violations, represented in the extreme by the death of Lynn Bluecloud and numerous other homeless people in Canada, are the "will of the majority." These rights violations go unaddressed because the institutional and legislative framework to call governments to account for them is lacking, not because Canadians do not perceive them as human rights issues in need of remedies.

Social and economic rights have particular resonance for women because they articulate women's lived experience of human rights violations. This is clearly illustrated in the recent Ontario human rights case of *Kearney et al.* v. *Bramalea Limited et al.*[210] After 60 days of hearings, involving complex statistical evidence of "adverse effect" on multiple grounds of discrimination, and almost $1 million spent by a coalition of landlords to defend their right to deny housing to low-income applicants, the Tribunal ruled that discrimination because of poverty is discrimination because of sex, race, family status and other intersecting grounds. This was the first time in Canada that a tribunal or court has formally recognized that discrimination because of poverty is sex discrimination. Catarina Luis, one of the complainants in the case, a black single mother of three, had been a refugee claimant from Angola when she and her daughter were refused housing because of her low income. She lived in shelters with her children on several occasions and, particularly after the 21 percent cut in Ontario social assistance rates and relied extensively on food banks to feed her family.

Ms. Luis summed up the significance of her victory before a throng of reporters in Toronto, three days before Christmas, saying: "I believe, especially in Canada, that it's a very cold country and people can't afford to live in the streets. Today it's so cold. How can I live in the street in this cold?"[211]

Canadian human rights jurisprudence has for too long been deprived of the practical and theoretical understanding of interdependence which comes with the adjudication of the rights claims of women living in poverty. If social and economic rights are included in the CHRA, it will be these claims which will be transformative of human rights discourse in Canada.[212] As Martin Scheinin, the Finnish member of the Human Rights Committee has observed about the impact of petition procedures before international treaty-monitoring bodies, the ability of women to bring their issues to adjudication is fundamental to developing an understanding of the interdependence of social and economic rights with civil and political rights.[213] Professor Scheinin points out that the *Airey* case,[214] a pivotal decision under the European Convention on Human Rights with respect to the right to counsel in civil cases, (invoked recently before the Supreme Court of Canada by Jeanine Godin, who was denied the same right in Canada)[215] was the result of a struggle by an Irish woman, living in a country which does not provide for divorce, seeking a legal separation because of violence and threats from her husband. Similarly, in the cases of *Zwann-de Vries* and *Broeks*,[216] in which two Dutch women challenged the denial of unemployment insurance on the basis of a presumption that married women would be maintained by their husbands, the Human Rights Committee, "after long discussions, expanded the protection of the non-discrimination provision in article 26 of the ICCPR to cover discrimination in the enjoyment of economic and social rights."[217]

The consultation paper prepared by the CHRA Review Panel to identify possible issues for review does not refer to the inclusion of social and economic rights, but asks whether reference should be made to Canada's international human rights obligations. [218] This issue is clearly central to the Review Panel's terms of reference, to examine "the purpose and grounds, including social condition, to ensure that the Act accords with modern human rights and equality principles" and to determine "the adequacy of the scope and jurisdiction of the Act." [219] Moreover, the Canadian government has made an explicit undertaking before the Committee on Economic, Social and Cultural Rights[220] to include this issue in the current CHRA review, and to consult "with other organizations and interested citizens."[221] The proposals put forward here to add social and economic rights to the CHRA would, if adopted, create a legislative and institutional framework which would allow some of the most pressing and fundamental human rights claims of women to move from the margin to the centre of human rights discourse. The amendments we propose, while respectful of concerns about parliamentary sovereignty, recognize and affirm the role of women's social and economic rights claims in enhancing democratic accountability, participation and transparency. Our proposed amendments represent only a preliminary attempt to address this issue. We hope the Human Rights Review Panel will support and encourage further efforts and discussions, in order to ensure that the current CHRA review process results in a federal human rights regime which better meets the goal of promoting the dignity and substantive equality of all women.

APPENDIX A: MODEL SOCIAL AND ECONOMIC RIGHTS AMENDMENT

Part III.1 Social And Economic Rights

Rights Guaranteed

1. (1) Everyone has a right to adequate food, clothing, housing, health care, social security, education, work which is freely chosen, child care, support services and other fundamental requirements for security and dignity of the person.

(2) These rights shall be interpreted and applied in a manner consistent with Canada's human rights treaty obligations and the fundamental value of promoting equality and alleviating social and economic disadvantage.

Discriminatory Practice

2. It is a discriminatory practice to deny a right under s. 1 based on a prohibited ground of discrimination, or on a combination of prohibited grounds, including based on social condition.

3. A discriminatory practice under s. 2 may be the subject of a complaint and of an order under Part III of this Act, whether or not it may also be the subject of a complaint and of an order under this Part.

Exception

4. (1) A discriminatory practice under s. 2 includes any policy or practice which results in the denial of a right under s. 1 to any disadvantaged individual or group, unless such a denial is reasonable and bona fide considering health, safety and cost.

(2) For a discriminatory practice under s. 2, by the Crown or an agency of the Crown, to be reasonable considering cost, its objective must be sufficiently important to warrant overriding a s. 1 right; it must be rationally connected to its objective; it must impair the right as little as possible; and its effects must be proportionate to its objective, considering the principles under s. 1.

Obligation of Parliament and the Government of Canada

5. (1) Parliament and the Government of Canada have an obligation to take steps, to the maximum of available resources, with a view to achieving progressively the full realization of the rights under s. 1 by all appropriate means, including taxation and fiscal policies, equalization payments, funding of shared cost programs, negotiation of federal–provincial/territorial and international agreements, and other legislative and regulatory measures, in accordance with Canada's international human rights treaty obligations and s. 36 of the *Constitution Act, 1982.*

(2) This obligation shall be carried out in a manner which recognizes the distinct needs and particular disadvantages facing low-income women, and ensures women's security and promotes their social and economic equality.

Interdependence of Rights

6. Federal laws, regulations, policies and practices shall be interpreted and applied in a manner consistent with the rights under s. 1 and the obligation under s. 5, and with the fundamental value of promoting equality and alleviating social and economic disadvantage.

7. Nothing in this Part limits or diminishes the rights or obligations contained elsewhere in this Act or in the *Canadian Charter of Rights and Freedoms*.

Social Rights Sub-committee

8. A social rights sub-committee of the Human Rights Commission, consisting of at least three full-time members with demonstrated experience in the area of social and economic rights, shall be responsible for evaluating and promoting compliance with this Part.

9. In particular, the social rights sub-committee shall:

(a) establish and revise standards according to which compliance with the rights under s. 1 can be measured;

(b) submit recommendations to appropriate government and private sector bodies on measures necessary to promote, respect and fulfil the rights under s. 1;

(c) evaluate government compliance under s. 5, including through review of federal laws, regulations, policies and practices;

(d) promote the production, exchange and dissemination of information and statistics on the social and economic circumstances of individuals with respect to the rights under s. 1, especially of those who are members of disadvantaged groups;

(e) encourage and facilitate government and private sector consultation with non-governmental organizations representative of disadvantaged groups with respect to the rights under s. 1;

(f) collaborate with similar bodies or authorities at the provincial and international level;

(g) respond to any request for information or invitation to intervene before the social rights panel;

(h) have the right to intervene in any proceeding before the social rights panel;

(i) report annually on the progress which has been made in achieving the objectives under this Part; and

(j) carry out any other task that is necessary or appropriate for the purpose.

10. With respect to Canada's international reporting obligations relating to the rights under s. 1, the sub-committee shall, in addition:

(a) encourage relevant government bodies to consult with non-governmental organizations representative of disadvantaged groups in the preparation of Canada's reports;

(b) disseminate the findings and recommendations of international treaty-monitoring bodies relating to Canada's reports;

(c) organize periodic meetings of relevant government bodies and non-governmental organizations to discuss the measures taken by Canada in response to such findings and recommendations; and

(d) submit independent opinions on issues of compliance with social and economic rights in international treaties ratified by Canada, on its own initiative or on request, where appropriate.

11. The social rights sub-committee shall respond to any request for information or invitation to intervene from the social rights panel, and the sub-committee shall have the right to intervene in any proceedings before the panel.

Social Rights Panel

12. A social rights panel of the Human Rights Tribunal, consisting of at least three full-time members with demonstrated experience in the area of social and economic rights, shall be responsible for inquiring into complaints that the government has infringed a right under s. 1 or failed to meet its obligation under s. 5.

13. (1) Any individual or group whose members are directly affected may submit a written complaint to the panel that the government has infringed a right under s. 1 or failed to meet its obligation under s. 5.

(2) On receipt of a complaint, the panel shall decide whether to hold a hearing into the complaint, and if so, it shall conduct the hearing in accordance with the procedures under Part III of the Act.

14. (1) Following the hearing into a complaint under s. 13, the panel shall issue a decision whether or not the complaint is justified.

(2) Where the panel decides that a complaint is justified, it shall:

(a) hear submissions from the complainant and the government regarding the measures required to achieve compliance with s. 1 or s. 5, and regarding the time required to carry out such measures; and

(b) make an order that the required measures be taken within a specified period of time, including an order requiring the amendment of any federal law, regulation, policy or practice.

15. (1) In lieu of making an order under s. 14, the panel may, where appropriate, order the government to report back by a specified date on measures taken or proposed to be taken which will achieve compliance with s. 1 or s. 5.

(2) On receipt of a report, the panel may make a further order under sub-section (1) or it may make an order under s. 14.

16. An order under s. 14 shall not come into effect until the House of Commons has sat for at least eight weeks, during which time the order may be overridden by a simple majority vote of Parliament. The government may indicate its acceptance of the terms of the order prior to the expiry of the time period specified in the order.

17. On coming into effect, an order under s. 14 may, for the purpose of enforcement, be made an order of the Federal Court by following the usual practice and procedure.

ENDNOTES

[1]*Universal Declaration of Human Rights*, GA Res. 217(III) UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71 [hereinafter *Universal Declaration*].

[2]R.S.C. 1985, c. H-6.

[3]Canadian Human Rights Commission. 1998. *Annual Report 1997.* Ottawa: Canadian Human Rights Commission, 2.

[4]*Ibid.* at 8.

[5]Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter Charter or Canadian Charter].

[6]R.S.Q. c. C-12.

[7]*Annual Report 1997 supra* note 3 at 8.

[8]See the discussion in Chapter 1, below.

[9]*International Covenant on Economic, Social and Cultural Rights*, December 16, 1966, 993 U.N.T.S. 3, Can. T.S. 1976 No. 46 (entered into force January 3, 1976, accession by Canada August 19, 1976) [hereinafter ICESCR].

[10]*International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No. 47 (entered into force March 23, 1976, accession by Canada May 19, 1976). [hereinafter ICCPR].

[11]*Convention on the Elimination of All Forms of Discrimination Against Women*, December 18, 1979, 1249 U.N.T.S. 13, Can. T.S. 1982 No. 31 (entered into force September 3, 1981, accession by Canada January 10, 1982) [hereinafter CEDAW].

[12]*ICCPR supra* note 10 at articles 2, 3 and 26.

[13]United Nations Human Rights Committee, *Consideration of Reports Submitted by Sates Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee (Canada)*, Geneva, April 7, 1999, CCPR/C/79/Add. 105 (1999) at par. 20 [hereinafter *Concluding Observations, 1999*].

[14]*Ibid.* at para. 9.

[15]*Ibid.* at para. 10.

[16]Summary records for the review of Canada are not yet available, but Minister Fry's verbal commitment was recorded by a number of the NGOs present at the meeting, including one of the authors of the present paper.

[17]United Nations Committee on the Elimination of Discrimination Against Women, *Adoption of the Report of the Committee on the Elimination of Discrimination Against Women on its Sixteenth Session: Concluding Observations of the Committee on the Elimination of Discrimination Against Women (Canada),* February 29, 1997, A/52/38/Rev.1 at paras 306-343 [hereinafter *Concluding Observations, 1997*].

[18]*Ibid.* at para. 336.

[19]United Nations Economic and Social Council, Committee on Economic, Social and Cultural Rights, *Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights (Canada)*, December 10, 1998, E/C.12/1/Add.31 [hereinafter *Concluding Observations, 1998*].

[20]R.S.C. 1985, c. C-1. See generally M. Jackman. 1995. "Women and the Canada Health and Social Transfer: Ensuring Gender Equality in Federal Welfare Reform" *Canadian Journal of Women and the Law.* 8: 371; S. Day and G. Brodsky. 1998. *Women and the Equality Deficit: The Impact of Restructuring Canada's Social Programs.* Ottawa: Status of Women Canada.

[21]*Concluding Observations, 1998*, *supra* note 19 at paras 23 and 28.

[22]*Ibid.* at para. 28. On the link between domestic violence and the right to housing, see Leilani Farha. 1999. "Women and Housing." In *Women and International Human Rights Law. Vol. 1.* Edited by K. Askin and D. Koenig. New York: Transnational Publishers, 483 at 514-518.

[23]G. York. 1993. "UN Body Chastises Canada on Poverty" *The Globe and Mail.* May 29, A1; R. Speirs. 1993. "UN Report on Poverty Levels is Flawed, Tories Say" *Toronto Star.* June 1, A12; V. Lawton. 1998. "UN Condemns Canadian Poverty." *Toronto Star.* December 5, A5; *House of Commons Debates* No. 161 (November 27, 1998).

[24]In its *Concluding Observations, 1998*, the Committee notes that Canada's ranking in the Human Development Index simply indicates a "capacity to achieve a high level of respect for all Covenant rights" which has not been achieved, *supra* note 19 at para. 3.

[25]United Nations Economic and Social Council, Committee on Economic, Social and Cultural Rights, *Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights (Canada)*, Geneva, June 10, 1993, E/C 12/1999/5; reproduced in (1994) 20 C.H.R.R. C/1 at paragraph 25 [hereinafter *Concluding Observations, 1993*].

[26]Committee on Economic, Social And Cultural Rights, Implementation of the International Covenant on Economic, Social and Cultural Rights, *List of issues to be taken up in connection with the consideration of the third periodic report of Canada concerning the rights referred to in articles 1-15 of the International Covenant on Economic, Social and*

Cultural Rights (E/1994/104/Add.17) E/C.12/Q/CAN/1 (June 10, 1998), para. 8, p. 2 [hereinafter *List of Issues]*.

[27]*Review of Canada's Third Report on the Implementation of the International Covenant on Economic, Social and Cultural Rights: Responses to the supplementary questions emitted by the United Nations Committee on Economic, Social and Cultural Rights* (E/C/12/Q/CAN/1) *on Canada's third report on the International Covenant on Economic, Social and Cultural Rights* (E/1994/104/Add17) [hereinafter *Responses to Supplementary Questions*].

[28]Nations Unies Conseil économique et social, Comité des Droits Économique, Sociaux et Culturels, *Compte Rendu analytique de la 48ème seance: Canada*, Geneve, novembre 27, 1998, E/C.12/1998/SR.48 at paras 12, 13, 15, 22 and 24.

[29]*Concluding Observations, 1998 supra* note 19 at para. 9.

[30]*Ibid.* at para. 51.

[31]*Annual Report 1997 supra* note 3 at 7.

[32]For an overview of the role of the Committee and the implementation measures under the ICESCR, see P. Alston and J.J. Quinn. 1987. "The Nature and Scope of States Parties' Obligations Under the International Covenant on Economic, Social and Cultural Rights." *Human Rights Quarterly.* 9: 156; P. Alston 1992. "The Committee on Economic, Social and Cultural Rights." In *The United Nations and Human Rights: A Critical Appraisal.* Edited by P. Alston. Oxford: Clarendon Press, 473.

[33]See generally, Bruce Porter. 1999. "Socio-economic Rights Advocacy - Using International Law: Notes from Canada." 2:1 *Economic & Social Rights Review.* July, 2: 1; M. Craven. 1994. "Towards an Unofficial Petition Procedure: A Review on the Role of the UN Committeee on Economic, Social and Cultural Rights." *Social Rights as Human Rights: A European Challenge.* Edited by K. Drzewicki, C. Krause and A. Rosas. London: Martinus Nijhoff, 91.

[34]United Nations Committee on Economic, Social and Cultural Rights, *Nineteenth Session General Comment No. 9 The Domestic Application of the Covenant, Committee on Economic, Social and Cultural Rights,* Geneva, November 16 - December 4, 1998, E/C.12/1998/24 [hereinafter *General Comment No. 9]*; United Nations Committee on Economic, Social and Cultural Rights, *Nineteenth Session General Comment No. 10 The Role of National Human Rights Institutions in the Protection of Economic, Social and Cultural Rights*, Geneva, November 16 - December 4, 1998 E/C.12/1998/25 [hereinafter *General Comment No. 10*].

[35]*General Comment No. 9, ibid.* at para. 3.

[36]*Ibid.* at para. 13.

[37]For an elaboration of the argument that equality rights provide the bridge between civil and political and economic and social rights, see Day and Brodsky, *Women and the Equality Deficit: The Impact of Restructuring Canada's Social Programs supra* note 20 at 48.

[38]*General Comment No. 9 supra* note 34 at para. 15.

[39]*General Comment No. 9 supra* note 34 at para. 5.

[40]*Ibid.* at paras 7, 9, 10.

[41]*Ibid.* at para. 9.

[42]*Ibid.* at para. 7.

[43]*Ibid.* at para. 8.

[44]*General Comment No. 10, supra* note 34 at para. 3.

[45]*Ibid.*

[46]United Nations Committee on Economic, Social and Cultural Rights, *Revised Guidelines Regarding the Form and Contents of Reports to be Submitted by States Parties Under Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights,* June 17, 1991, Un Doc. E/C.12/1989/SR.8 at part B article 11.

[47]*Ibid.* at 185.

[48][1997] 3 S.C.R. 624 [hereinafter *Eldridge*].

[49]*Ibid.* at 620-621.

[50]*Andrews* v. *Law Society of British Columbia*, [1989] 1 S.C.R. 143 [hereinafter *Andrews*].

[51]*Ibid.* at 13.

[52]*Eldridge supra* note 48 at 677-78; see also *Vriend* v. *Alberta*, [1998] 1 S.C.R. 493 at 532-34. For a general discussion of this aspect of the *Eldridge* and *Vriend* decisions see Porter, B. 1998. "Beyond *Andrews*: Substantive Equality and Positive Obligations After *Eldridge* and *Vriend.*" *Constitutional Forum. 9:3,* 71; Jackman, M. 1998. "Giving Real Effect to Equality: *Eldridge* v. *British Columbia (Attorney General)* and *Vriend* v. *Alberta.*" *Review of Constitutional Studies.* 4: 352.

[53]*Eldridge, supra* note 48 at 681.

[54]*Ibid.* at 623. LaForest, J. goes on to review a series of cases in which positive obligations were imposed under human rights legislation, including *Re Saskatchewan Human Rights Commission and Canadian Odeon Theatres Ltd.* (1985), 18 D.L.R. (4th) 93 (Sask. C.A.), leave to appeal refused, [1985] 1 S.C.R. vi; *Howard* v. *University of British Columbia*

(1993), 18 C.H.R.R. D/353; and *Le Centre de la communauté sourde de Montréal métropolitain inc.* c. *Régie du logement*, [1996] R.J.Q. 1776.

[55]The most decisive shift from a formal to a substantive approach to equality by the Supreme Court was in a sex discrimination case brought under human rights legislation: *Brooks* v. *Canada Safeway* [1989] 1 S.C.R. 1219. In finding that an employee benefit plan that differentiated adversely against pregnant women violated sex equality guarantees under Manitoba human rights legislation, the Supreme Court reversed its earlier decision in the *Bliss* v. *Attorney General of Canada* [1979] 1 S.C.R. 83, where it had ruled that an unemployment insurance regime that provided lesser benefits to pregnant women was not discriminatory because it treated all pregnant "people" the same. The Court's subsequent decision in *CN* v. *Canada (Canadian Human Rights Commission)* [1987] 1 S.C.R. 114, involving a CHRA challenge by Action Travail des Femmes to the systemic under-hiring of women at CN Rail, clearly affirmed that equality rights have a strong "remedial component," focussing on the alleviation of systemic disadvantage and requiring positive measures.

[56]*Slaight Communications* v. *Davidson,* [1989] 1 S.C.R. 103 [hereinafter *Slaight Communications*].

[57]*Ibid.* at 1056.

[58]*Baker* v. *Minister of Citizenship and Immigration*, [1999] S.C.J. No. 39 [hereinafter *Baker*]. The *Baker* case involved a challenge by Mavis Baker, a Jamaican citizen employed as a domestic worker in Canada, to the denial of her application for permanent residence on humanitarian and compassionate grounds, notwithstanding that her deportation would separate her from her Canadian-born children, in contravention of articles 3, 9(1) and 10(1) of the *Convention on the Rights of the Child,* November 20, 1989, Can T.S. 1992 No. 3; UN Doc. A/RES/44/25 (entered into force September 2, 1990 and in force for Canada May 28, 1990) [hereinafter CRC]. For a discussion of the Baker case, see Scott, C. 1999. "Canada's International Human Rights Obligations and Disadvantaged Members of Society: Finally Into the Spotlight." *Constitutional Forum.* 10 (forthcoming).

[59]*Supra* note 56.

[60][1990] 3 S.C.R. 697.

[61]*Supra* note 58 at para. 70.

[62]*R. v. Ewanchuk*, [1999] 1 S.C.R. 330 at 365 [hereinafter *Ewanchuk*].

[63]See, for example, the Preface to the Ontario *Human Rights Code*, R.S.O. 1990 c. H-19; and the Preface to the Prince Edward Island *Human Rights Act*, R.S.P.E.I. 1998 c. H-12.

[64]*Attorney General of Quebec* v. *Irwin Toy,* [1989] 1 S.C.R. 927 at 1003-1004.

[65]*List of Issues, supra* note 26 at paragraph 53.

[66]*Responses to Supplementary Questions, supra* note 27 at Question 53 (Government of Canada).

[67]In argument before the Supreme Court of Canada in *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, the federal government asserted to similar effect that: "Canadian constitutional structures are fully in compliance with" the *Universal Declaration* and the *ICESCR*; *Factum of the Attorney General of Canada in the Matter of a Reference by the Governor in Council Concerning Certain Questions Relating to the Secession of Quebec from Canada*, Court File No. 25506 (Supreme Court of Canada) at 71, paragraph 195.

[68]*Ewanchuk, supra* note 62 at 365.

[69]*Human Rights Code, supra* note 62.

[70]Hon. G.V. LaForest. 1996. "The Expanding Role of the Supreme Court of Canada in International Law Issues." *Canadian Yearbook of International Law.* 34: 89 at 98.

[71]*General Comment No. 9, supra* note 34 at para. 10.

[72]*Concluding Observations, 1998, supra* note 19 at para. 14.

[73]*Ibid.* at para. 15.

[74]*Masse* v. *Ontario* (1996), 134 D.L.R. (4th) 20, leave to appeal to Ontario Court of Appeal denied (1996), 40 Admin. L.R. 87N, leave to appeal to the Supreme Court of Canada denied (1996), 39 C.R.C. (2d) 375 [hereinafter *Masse*].

[75]*Concluding Observations, 1998, supra* note 19 at para. 21.

[76]*Masse*, *supra* note 74; Affidavit of Michael Ornstein, Application Record, Volume II, Tab 15; Affidavit of Gerard Kennedy, Application Record, Volume II, Tab 14 in *Masse* v. *Ontartio*, Ont.C. J. (Gen. Div.) Court File No. 590/95.

[77]*Ibid.* at 69, para. 40. On the link between the cuts and increased vulnerability to domestic violence, see Ontario Association of Interval and Transition Houses, *Locked In, Left Out: Impacts of the Progressive Conservative Budget Cuts and Policy Initiatives on Abused Women and their Children in Ontario* (Toronto: OAITH, November, 1996).

[78]See the discussion in Part III, below.

[79]*Concluding Observations, 1993, supra* note 25 at para. 119.

[80]*Ibid.* at paras 101-109, 115, 116, 121.

[81]*Masse, supra* note 74 at 46.

[82]*Ibid.* at 46-47.

[83]*Dandridge* v. *Williams*, 90 S. Ct. 1153 (1970) at 1162-63.

[84]See generally, M. Jackman. 1999. "From National Standards to Justiciable Rights: Enforcing International Social and Economic Guarantees Through Charter of Rights Review." *Journal of Law & Social Policy.* 14: 69; J. Keene. 1998. "Claiming the Protection of the Court: *Charter* Litigation Arising from Government Restraint." *National Journal of Constitutional Law.* 9; Day and Brodsky. *Women and the Equality Deficit. supra* note 20 at 79-108; M. Jackman. 1993. "Poor Rights: Using the Charter to Support Social Welfare Claims."*Queen's Law Journal.* 19: 65.

[85]*Conrad* v. *Halifax (County)* (1994), 130 N.S.R. (2d) 305 (Court of Appeal) affirming (1994), 124 N.S.R. (2d) 251.

[86]*New Brunswick (Minister of Health and Community Services v. G. (J.)* (1997), 145 D.L.R. (4th) 349 (N.B.C.A.) at 356.

[87]*Elizabeth Wiebe* v. *The Queen in Right of Ontario et al.,* Ontario Human Rights Commission Complaint No. 20-106S (filed with the Ontario Human Rights Commission on June 12, 1989, dismissed February 16, 1996).

[88]*Ibid.*

[89]*Clark* v. *Peterborough Utilities Commission* (1995), 24 O.R. (2d) 7 at 28 [hereinafter *Peterborough Utilities*].

[90]*Ibid.* at 33.

[91]*Louise Gosselin c. Procureur général du Québec* (April 6, 1999) Montréal 500-09-001092-923 (C.A.); [1992] R.J.Q. 1657 (C.S.) at 1658 (C.S).

[92]*Ibid.* at 1670 (C.S.).

[93]*Ibid.* at 18 (C.A).

[94]See generally M. Mandel. 1994. *The Charter of Rights and the Legalization of Politics in Canada.* Toronto: Thompson Educational; J. Simpson. 1994. "Rights Talk: The Effect of the Charter on Canadian Political Discourse." In *Protecting Rights and Freedoms: Essays on the Charter's Place in Canada's Political, Legal and Intellectual Life*. Edited by P. Bryden, S. Davis and J. Russell. Toronto: University of Toronto Press, 52; R. Knopff and F.L. Morton. 1992. *Charter Politics.* Scarborough: Nelson Canada; J. Bakan. 1991. "Constitutional Interpretation and Social Change: You Can't Always Get What You Want (Nor What You Need)." *Canadian Bar Review.* 70: 307; A.C. Hutchinson and A. Petter. 1988. "Private Rights/Public Wrongs: The Liberal Lie of the Charter."*University of Toronto Law Journal.* 38: 278.

[95]See J. Bakan and D. Schneiderman, eds. 1992. *Social Justice and the Constitution: Perspectives on a Social Union for Canada.* Ottawa: Carleton University Press; Bruce

Porter. 1998. "Social Rights and the Question of a Social Charter." In *Finding Our Collective Voice, Options for a New Social Union.* Edited by P. Leduc Browne. Ottawa: Canadian Centre for Policy Alternatives, 59.

[96]See generally W. Black. 1996. "Vriend, Rights and Democracy."*Constitutional Forum.* 7: 126; M. Jackman. 1996. "Protecting Rights and Promoting Democracy: Judicial Review Under Section 1 of the Charter."*Osgoode Hall Law Journal.* 34: 661; C. Scott and P. Macklem. 1992. "Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution." *University of Pennsylvania Law Review.* 141:1.

[97]For example, in *Roberts* v. *Ontario (Ministry of Health)* (1994), 117 D.L.R. (4th) 297, the Ontario Court of Appeal ordered the Government of Ontario to abolish an age restriction in an assistive devices program in order to comply with the Ontario *Human Rights Code*, notwithstanding that the restriction had been adopted to limit costs. Similarly, in *Eldridge supra* note 47 at 631-32, the Supreme Court ordered the Government of British Columbia to "ensure that sign language interpreters will be provided where necessary for effective communication in the delivery of medical services" in order to comply with the equality rights provisions of the Charter.

[98]Ekos Research Associates Inc. 1997. *Memorandum Concerning Child Poverty Focus Groups: Revised Conclusions.* February 4. Secured through a freedom of information request by Jean Swanson.

[99]*Supra* note 52.

[100]J.H. Ely. 1980. *Democracy and Distrust.* Cambridge: Harvard University Press at 151, cited in *Andrews supra* note 49 at 152.

[101]See A.R. Chapman. 1996. "A Violations Approach for Monitoring the International Covenant on Economic, Social and Cultural Rights." *Human Rights Quarterly.* 18: 23; P. Alston. 1991. "No Right to Complain About Being Poor: The Need for an Optional Protocol to the Economic Rights Covenant." In *The Future of Human Rights Protection in a Changing World.* Edited by A. Eide and J. Helgesen. London: Martinus Nijhoff; Craven, "Towards an Unofficial Petition Procedure", *supra* note 33; Scott Leckie. 1998. "Another Step Towards Indivisibility: Identifying Key Features of Violations of Economic, Social and Cultural Rights."*Human Rights Quarterly.* 20: 81; Scott and Macklem, "Constitutional Ropes of Sand or Justiciable Guarantees?" *supra* note 96.

[102]In 1998, the Canadian Human Rights Commission engaged in discussions with human rights bodies in Indonesia, India, South Africa and Mexico around the issue of improved domestic enforcement of human rights, including social and economic rights; Canadian Human Rights Commission. 1999. *Annual Report 1998.* Ottawa: Canadian Human Rights Commission.

[103]*European Social Charter (Revised),* May 3, 1996, E.T.S. No. 163 (entered into force July 1, 1999) in B.H. Wester ed. 1997. *International Law and World Order: Basic Documents.* May at Vol. 3, Doc III.3.16d.

[104]*Ibid.* especially Part II.

[105]*Ibid.* at Part IV, Article C in reference to the *Additional Protocol to the European Social Charter Providing for a System of Collective Complaints*, November 9, 1995, E.T.S. No. 158 (entered into force July 1, 1998).

[106]*Constitution of the Republic of South Africa 1996*, Act 108 of 1996 at sections 26(1) and 27(1).

[107]*Ibid.* at sections 34 and 38; see for example *Thiagraj Soobramoney* v. *Minister of Health* CCT 32/97 (decided November 1997). For a full discussion of the standard of judicial review of social and economic rights under South Africa's Constitution, see Sandra Liebenberg. 1996. "Socio-Economic Rights." In *Constitutional Law of South Africa*. Edited by M. Chaskalson et al. 3rd Revision Service, Johannesburg: Juta & Co. Ltd.

[108]*Supra*, note 106 at ss 26(2), 27(2) and 34.

[109]*Ibid.* at s. 8(2).

[110]*Ibid.* at s. 184; *Human Rights Commission Act*, No.54/1994 at s. 7, by virtue of which the South African Human Rights Commission has established the "International Co-ordination Committee" to monitor South Africa's observance of its obligations under international law and to keep abreast of developments at the UN, the Organization of African Unity and other national human rights institutions worldwide; see generally S. Liebenberg. 1997. "Identifying Violations of Socio-Economic Rights: The Role of the South African Human Rights Commission." *Law, Democracy and Development*. November, 1:161.

[111]*Ibid.* at s. 184(3).

[112]The United States has refused to ratify the ICESCR and is one of only two countries to refuse to ratify the CRC.

[113]Sandra Liebenberg, "Socio-economic Rights", *supra* note 107 at 19-28.

[114]*Concluding Observations, 1993, supra* note 25 at para. 114, 119-121.

[115]See *Resolution on Economic and Social Rights*, Res. No. 10.1 (DRAFT), Canadian Association of Statutory Human Rights Agencies, 1999 Annual Meeting, Montreal, May 31, 1999.

[116]For a discussion of social and economic rights provisions of the Quebec Charter, see P. Bosset. 1996. "Les droits économiquess et sociaux: parents pauvres de la Charte québécoise?"*Canadian Bar Review.* 75: 583; H. Tessier. 1996. "Lutte contre la pauvreté : question de droits de la personne et mesure de prévention contre une violence systémique à l'égard des enfants."*Cahiers de droi.* 37: 475; A. Collard. 1987. "La condition sociale : est-ce vraiment un motif de discrimination?"*Revue du Barreau.* 47: 188.

[117]"Source of income" is a prohibited ground of discrimination in Alberta, Manitoba and Nova Scotia; "receipt of public assistance" is a prohibited ground in Saskatchewan and (in relation to accommodation) in Ontario; "social origin" is a prohibited ground in Newfoundland; and "social condition" is a prohibited ground in Quebec; see generally R.W. Zinn and P.P. Brethour. 1997. *The Law of Human Rights in Canada.* Looseleaf, Aurora, Ontario: Canada Law Book.

[118]*Concluding Observations, 1998, supra* note 19 at para. 52.; *Concluding Observations, 1993, supra* note 25 at para. 110.

[119]See generally Provincial/Territorial Council on Social Policy Renewal. 1998. *Progress Report to Premiers - Report No. 3.* August; Provincial/Territorial Council on Social Policy Renewal. 1997. *New Approaches to Canada's Social Union: An Options Paper.* April; Provincial/Territorial Council on Social Policy Renewal. 1997. *Progress Report to Premiers - Report No. 2.* July; and 1996 APC Provincial-Territorial Working Group on Social Policy Reform and Renewal. 1996. *Issues Paper on Social Policy Reform and Renewal: Next Steps.* August.

[120]For a description of this trend, see National Anti-Poverty Organization. 1998. *Poverty and the Canadian Welfare State: A Report Card.* Ottawa: National Anti-Poverty Organization, June; C. Girard and L. Lamarche. 1998. "Évolution de la sécurité sociale au Canada : Le mise à l'écart progressive de l'état providence Canadien."*Journal of Law & Social Policy.* 13: 95; R. Ellsworth. 1997. "Squadering Our Inheritance: Re-Forming the Canadian Welfare State in the 1990s."*Journal of Law & Social Policy.* 12: 259.

[121]See Jackman, "Women and the CHST", *supra* note 20; Day and Brodsky, *Women and the Equality Deficit*, *supra* note 20; K. Scott, *Women and the CHST: A Profile of Women Receiving Social Assistance in 1994.* Ottawa: Status of Women Canada, 57.

[122]United Nations General Asembly, World Conference on Human Rights, *Vienna Declaration and Programme of Action*, Vienna, June 14 - 25, 1993, UN Doc. A/CONF.157/23 (July 12, 1993) at paras 36-37.

[123]*National Institutions for the Promotion and Protection of Human Rights*, GA Res. 48.134, UN GAOR, 48th Sess., 8th Plenary Mtg, UN Doc. A/RES/48/134 (December 20, 1993); *National Institutions for the Promotion and Protection of Human Rights*, Res. 1994/54, UN HRC, 56th Meeting, UN Doc. E/CN.4/RES/1994/54 (March 4, 1994) [hereinafter *Paris Principles*].

[124]*Ibid.* at paras 2 and 3(b).

[125]*Supra* note 34 at para. 3.

[126]See generally, Scott, "Canada's International Human Rights Obligations and Disadvantaged Members of Society," *supra* note 58.

[127]*Concluding Observations, 1998*, *supra* note 19 at para. 16.

[128]*Ibid.* at para. 22; *Concluding Observations, 1999, supra* note 13 at para. 18.

[129]*Concluding Observations, 1993, supra* note 25 at paras 107 and 116.

[130]*Concluding Observations, 1999, supra* note 13 at para. 17; *Concluding Observations, 1998, supra* note 19 at paras 31 and 32.

[131]*Concluding Observations, 1998, ibid.* at para. 26.

[132]*Concluding Observations, 1997, supra* note 17 at para. 331.

[133]*Concluding Observations, 1998, supra* note 19 at paras 21 and 46.

[134]On the issue of workfare, see *Gosselin*, *supra* note 91 and *Lambert* v. *Québec (Ministère du Tourisme),* [1996] J.T.D.P.Q. No. 42 ; on direct payment of rent, see *McEwen* v. *Warden Building Management Ltd. and V.I.P. Property Mangement Ltd.* (November 14, 1993) (O.H.R.T.) [unreported]; on minimum income criteria, see *Quebec (Comm. des droits de la personne)* v. *Whittom* (1993), C.H.R.R. D/349 and *Kearney et al.* v. *Bramalea Limited et al.*, [1998] 21 O.H.R.B.I.D., Decision No. 98-021. In both the *Whittom* and *Kearney* cases, international human rights provisions relating to the right to adequate housing were argued, but were not addressed in the tribunals' decisions. See, for example, the expert report submitted in *Kearney*, Exhibit 42, Scott Leckie. 1995. "Income Discrimination in Rental Housing and Canada's International Human Rights Obligations." March.

[135]Canadian Human Rights Commission, *Annual Report 1997*, *supra* note 3.

[136]*Reference Re Constitutional Questions Act (B.C.),* [1991] 2 S.C.R. 525; *Eldridge, supra* note 48. Section 36 entrenches an express commitment by the federal government and the provinces to: "promoting equal opportunities for the well-being of Canadians"; "furthering economic development to reduce disparity of opportunities"; and "providing essential public services of reasonable quality to all Canadians." This provision represents a constitutionally binding undertaking on the part of the federal and provincial governments to promote equal opportunities for the welfare of women and men living in all parts of the country, and to provide basic public services of reasonable and comparable quality to all Canadians.

[137]*Supra* note 1. While the Universal Declaration was originally intended to stand as a statement of principle, it is now accepted by many legal scholars that it has achieved the status of customary international law, and hence applies to Canada to the same extent as conventional international law; see for example J. Claydon. 1982. "International Human Rights Law and the Interpretation of the *Canadian Charter of Rights and Freedoms*." *Supreme Court Law Review.* 4: 287 at 288-89.

[138]Article 25(1) of the Universal Declaration provides that: "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control." Other social and economic

rights recognized under the Universal Declaration include the right to "social security" and to the realization of social and economic rights "indispensable for [a person's] dignity and the free development of his [or her] personality" under Article 22; the right to work, to free choice of employment, to protection against unemployment, and to remuneration ensuring "an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection" under Article 23; and the right to education under Article 26.

[139]*Supra* note 9. For a review of rights contained under the ICESCR, see generally L. Lamarche. 1995. *Perspectives occidentales du droit international des droits économiques de la personne.* Brussels: Bruylant; M. Craven. 1995. *The International Covenant on Economic, Social and Cultural Rights.* Oxford: Clarendon Press.

[140]Article 6 of the ICESCR guarantees "the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts..." Article 9 recognizes "the right of everyone to social security, including social insurance." Article 10 declares that "The widest possible protection and assistance should be accorded to the family...particularly...while it is responsible for the care and education of dependent children..." Article 11(2), in terms similar to the Universal Declaration, guarantees: "the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions."

[141]*Supra* note 11. For a discussion of the CEDAW and the general issue of the international protection of women's rights, see *The United Nations and the Advancement of Women, 1945-1995.* 1995. New York: Department of Public Information, United Nations.

[142]Among the specific social and economic rights guaranteed in the CEDAW are the right to equality in education, under Article 10; in employment, under Article 11; in health care, under Article 12; and in other areas of social and economic life, including the right to family benefits and to financial credit, under Article 13. Article 11(2)(c) of the CEDAW provides that: "In order to prevent discrimination against women on the grounds of...maternity and to ensure their effective right to work, States Parties shall take appropriate measures.... To encourage the provision of necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life..."

[143]*CRC, supra* note 58. For a discussion of the CRC see generally L.J. Leblanc., 1995. *The Convention on the Rights of the Child: United Nations Law-Making on Human Rights.* Lincoln, University of Nebraska Press.

[144]Article 24 of the CRC recognizes the right of the child to "the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health." Article 26 of the CRC sets out "for every child the right to benefit from social security, including social insurance..." Under Article 27(1), state parties "recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development." Article 27(3) of the CRC states that: "State Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case

of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing." Article 28 sets out "the right of the child to education." Recognition of the need for adequate supports for women as parents, and in their efforts to combine family and work responsibilities, is reflected in Article 18 of the CRC, which requires state parties to "render appropriate assistance to parents...in the performance of their child-rearing responsibilities."

[145]See United Nations Economic and Social Council, Committee on Economic, Social and Cultural Rights, Sixth Sess., *General Comment No. 4 The Right to Adequate Housing (Article 11(1) of the Covenant),* Geneva, December 13, 1991, E/1992/23; United Nations Economic and Social Council, Committee on Economic, Social and Cultural Rights, Sixteenth Sess., April 28 - May 16, 1997, *General Comment No. 7 The Right to Adequate Housing (article 11.1 of the Covenant): Forced Evictions*, Geneva , May 20, 1997, E/C.12/1997/4.

[146]United Nations Economic and Social Council, Committee on Economic, Social and Cultural Rights, Twentieth Sess., April 26 - May 14, 1999, *General Comment No. 12 The Right to Adequate Food (article 11.1)*, Geneva, May 12, 1999, E/C.12/1999/5.

[147]United Nations Economic and Social Council, Committee on Economic, Social and Cultural Rights, Eleventh Sess., 38th Mtg., November 25, 1994, *General Comment No. 5 Persons With Disabilities*, Geneva November 25, 1994, E/C.12/1994/13.

[148]United Nations Economic and Social Council, Committee on Economic, Social and Cultural Rights, Thirteenth Sess., 39th Mtg., November 20 - December 8, 1995, *General Comment No. 6 The Economic, Social and Cultural Rights of Older Persons*, Geneva, November 24, 1995, E/1996/22 as reported in (1996) 3:2 *I.H.R.R.* at 253.

[149]United Nations Economic and Social Council, Committee on Economic, Social and Cultural Rights, 5th Sess., 1990, *General Comment No. 3 The nature of states parties' obligations (art 2(1)),* E/1991/23; *General Comment No. 9*, *supra* note 37 and *General Comment No. 10*, *supra* note 37.

[150]*General Comment No. 3*, *ibid.* at para. 8; *General Comment No. 4, supra* note 38 at paras 10, 11 and 13-15; *General Comment No. 7, supra* note 38 at paras 9, 10 and 14-17.

[151]*Concluding Observations, 1998, supra* note 19 at para. 26.

[152]Sandra Liebenberg, "Socio-economic Rights," *supra* note 107 at 29.

[153]Article 2(2) of the ICESCR guarantees enjoyment of the rights contained in the ICESCR without discrimination "of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." Under Article 3 of the ICESCR, state parties "undertake to ensure the equal rights of men and women to the enjoyment of all economic, social and cultural rights." Article 3 of the CEDAW guarantees sex equality in "the exercise and enjoyment of human rights"; and Article 5(e) of the *International Convention on the Elimination of All Forms of Racial Discrimination*,

December 21, 1965, 660 U.N.T.S. 195, Can. T.S. 1970 No. 28 (entered into force January 4, 1969, ratified by Canada November 13, 1970) prohibits discrimination on the basis of race, colour or national or ethnic origin in relation to the enjoyment of social and economic rights.

[154]Section 3 of the CHRA currently includes "race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for which a pardon has been granted" as prohibited grounds of discrimination. Section 3.1 provides that a discriminatory practice includes "a practice based on one or more prohibited grounds of discrimination or on the effect of a combination of prohibited grounds."

[155]For example, in *Canada (Attorney General)* v. *Druken* (1988), 9 C.H.R.R. D/5359 (F.C.A.), the provision of federal unemployment insurance was held to be a "service available to the public" under the CHRA; as was the application of the *Income Tax Act*, in *Bailey* v. *Minister of National Revenue* (1980), 1 C.H.R.R. D/193 (Cdn. Human Rights Trib.). However, in a recent decision for a majority of the Federal Court of Appeal in *Canada (Attorney General)* v. *McKenna*, [1997] 1 F.C. 401 at 448-449, Robertson, J.A. stated, in *obiter*, that the Court's decision in *Druken* did not support the proposition that a denial of citizenship under the federal *Citizenship Act* constituted a denial of a "service available to the public."

[156]See for example *Chambers* v. *Government of Saskatchewan* (1988), 9 C.H.R.R. D/5181 at 5187 (Sask.C.A.), where Vancise J.A. reversed a lower court decision that social assistance payments were not "services customarily available to the public"stating: "Broadly speaking, services provided by the Crown are available to all members of the public. Most services the Crown provides can be described as publicly available benefits. Provision of financial assistance to people in need is but one example."

[157]In *Floyd* v. *Canada (Employment & Immigration Commission)* (1993), 20 C.H.R.R. D/381 (Cdn. Human Rights Trib.), for example, provisions of the *Unemployment Insurance Act* restricting the eligibility of pregnant women were held to constitute a discriminatory practice based on sex within the meaning of s. 5 of the CHRA. In *Moore* v. *Canada (Treasury Board)* (1996), 25 C.H.R.R. D/351 (Cdn. Human Rights Trib.), a denial of federal employment-related health care benefits was found to be discriminatory on the basis of sexual orientation.

[158]In *LeDeuff* v. *Canada (Employment and Immigration Commission)* (1987), 9 C.H.R.R. D/4479 (Cdn. Human Rights Rev. Trib.), it was held that whenever the government of Canada applies an act of general scope, it is providing a service to the public within the meaning of the CHRA.

[159]See for example *Schaap* v. *Canada (Canadian Armed Forces)* (1988), 12 C.H.R.R. D/4451 (F.C.A.).

[160]See for example *Grover* v. *Canada (National Research Council)* (1992), 18 C.H.R.R. D/1 (Cdn. Human Rights Trib.).

[161]For example, in *MacGillivray* v. *Hume's Transportation Ltd.* (1982), 3 C.H.R.R. D/732 (Cdn. Human Rights Trib.), a federally regulated trucking company's failure to pay provincial health insurance premiums for a female employee, when such benefits were provided to male employees, was found to be a discriminatory practice based on sex under s. 7 of the CHRA.

[162]This is effectively what occurred in the *Gosselin* case, *supra* note 91, where Louise Gosselin's challenge to inadequate welfare rates for single employable persons under the age of 30, relying on the anti-discrimination and the social and economic rights provisions of the Quebec *Charter of Human Rights and Freedoms*, was dismissed by trial court on the grounds that social and economic rights are merely "policy objectives" and not enforceable rights.

[163] *Eldridge*, *supra* note 48 at 675.

[164]See generally M. Jackman. 1994. "Constitutional Contact With the Disparities in the World: Poverty as a Prohibited Ground of Discrimination Under the Canadian Charter and Human Rights Law." *Review of Constitutional Studies.* 2: 76; S. Turkington. 1993. "A Proposal to Amend the Ontario Human Rights Code: Recognizing Povertyism." *Journal of Law & Social Policy.* 9: 134.

[165]*Supra* note 98.

[166]*Concluding Observations, 1993, supra* note 25 at paras 107 and 116; *Concluding Observations, 1998, supra* note 19 at para. 51.

[167]Section 67 of the CHRA provides that: "Nothing in this *Act* affects any provision of the *Indian Act* or any provision made under or pursuant to that *Act*."

[168]*Concluding Observations*, 1998, supra note 19 at para. 17.

[169]*Concluding Observations*, 1999, supra note 13 at para. 8.

[170] See for example Native Women's Association of Canada. 1997. *Hear Their Stories.* Ottawa, Native Women's Association of Canada; M. Dion Stout and G.D. Kipling. 1998. *Aboriginal Women in Canada: Strategic Research Directions for Policy Development.* Ottawa, Status of Women, at 3-8; and see also the sources of statistical information on Aboriginal women catalogued in Status of Women Canada. 1998. Finding Data on Women: A Guide to Major Sources. Ottawa, Status of Women Canada at 86-87.

[171]The issue of income criteria as a form of sex and marital status discrimination against single mothers has been addressed in the context of rental housing in Quebec and Ontario; see *Quebec (Comm. Des droits de la personne)* v. *Whittom*, *supra* note 134 and *Kearney et al.* v. *Bramalea Limited et al.*, *supra* note 134.

[172]Courts and tribunals, of course, may give weight to the broader social and economic dimensions in assessing whether a policy or practice can be justified and in considering

remedies. The intersection of credit criteria with the broader systemic patterns of poverty and exclusion, however, have generally lead courts to find that equality protections do not apply, rather than to apply them more rigorously in light of their serious effects. See, for example, *Clark* v. *Peterborough Utilities Commission*, *supra* note 89.

[173]432 U.S. 63 (1977).

[174]*Central Okanagan School District No. 23* v. *Renauld*, [1992] 2 S.C.R. 970 at 984-5; see also *Howard* v. *University of British Columbia* (1993), 18 C.H.R.R. D/353 (B.C. Council of Human Rights).

[175]In *Saskatchewan Human Rights Commission* v. *Ripplinger* (1993), 20 C.H.R.R. D/427 (Sask. Board of Inquiry). Affd (1996), 24 C.H.R.R. D/435, the board found that making an art gallery wheelchair accessible at a cost of $30,000 would not result in undue hardship. The gallery's net annual income was $600,000 to $700,000. In *Quesnel* v. *London Educational Health Centre* (1995) 28 C.H.R.R. D/474 (Ont. Board of Inquiry) the board held that a chiropractor with an income of between $61,438 and $73,640 had a duty to make his offices wheelchair accessible, at a cost of $19,657. For concerns about the undue hardship standard see, however, S. Day and G. Brodsky. 1996. "The Duty to Accommodate: Who Will Benefit?"*Canadian Bar Review.* 75: 433.

[176]With respect to duties on the government as an employer, see *Re Ontario (Ministry of Government Services) and OPSEU (Kimmel/Leaf)* (1991), 21 L.A.C 129 in which a grievance settlement board found that the Ministry of Labour in Ontario was required to accommodate the needs of religious minorities by providing them with paid leaves of absences on religious holidays at estimated annual cost of $2.5 million.

[177]*Singh* v. *Canada (Minister of Employment and Immigration)*, [1985] 1 S.C.R. 177 at 218-219; *Schachter* v. *Canada (Employment and Immigration Commission)*, [1992] 2 S.C.R. 679 at 709.

[178]*R.* v. *Oakes*, [1986] 1 S.C.R. 103.

[179]*McKinney* v. *University of Guelph*, [1990] 3 S.C.R. 229 at 303.

[180]*Eldridge, supra* note 48 at 624.

[181] *Supra* note 136.

[182]*Maastricht Guidelines on Violations of Economic, Social and Cultural Rights* at para. 8 as reproduced in "The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights."*Human Rights Quarterly.* 1998, 20: 691. The Maastricht Guidelines were developed by a group of more than 30 experts who met in Maastricht January 22 – 26, 1997, at the invitation of the International Commission of Jurists and others, in order to elaborate on the earlier Limburg Principles on the nature and scope of violations of economic, social and cultural rights and appropriate responses and remedies; see V. Dankwa, C. Flinterman and

S. Leckie. 1998. "Commentary on the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights."*Human Rights Quarterly.* 20: 704.

[183]*General Comment No. 3, supra* note 149 at paras 2 and 9.

[184]*General Comment No. 12, supra* note 146 at paras 21 and 22; *General Comment No. 4, supra* note 145 at para. 12.

[185]See R. E. Robertson. 1994. "Measuring State Compliance with the Obligation to Devote the 'Maximum Available Resources' to Realizing Economic, Social and Cultural Rights." *Human Rights Quarterly.* 16: 693 at 698; Alston and Quinn, "The Nature and Scope of States Parties' Obligations," *supra* note 32 at 177-181.

[186]*Soobramoney* v. *Minister of Health, KwaZulu-Natal* (1997) (12) BCLR 1696 (CC) at paragraph 43.

[187]*Ibid.* para. 31.

[188]*General Comment No. 3, supra* note 149 at para. 10.

[189]*Ibid.* para. 9. For a discussion of this issue in relation to the repeal of CAP, see C. Scott. 1995. "Covenant Constitutionalism and the Canada Assistance Plan."*Constitutional Forum.* 6: 79 at 82; and see also Scott and Macklem, "Constitutional Ropes of Sand or Justiciable Guarantees", *supra* note 96 at 81.

[190]*Concluding Observations, 1998, supra* note 19 at para. 12.

[191]*Vienna Convention on Law of Treaties*, May 23, 1969; 115 U.N.T.S. 331; 8 I.L.M. 679 (entered into force January 27, 1980), art. 27.

[192]*Concluding Observations, 1993*, *supra* note 25 at para. 20; *Concluding Observations, 1998*, *supra* note 19 at paras 17, 34, 40, 41, 44, 45, 46, 52, 54.

[193]*Baker*, *supra* note 58.

[194]*Ibid.* at paras 79-80, per Iacobucci, J.

[195]*Eldridge*, *supra* note 48.

[196]This would include the concluding observations of treaty-monitoring bodies.

[197]*Paris Principles*, *supra* note 123 at para. 3(b); *General Comment No. 10*, *supra* note 34 at paragraph 3(b).

[198]*Paris Principles*, *ibid.* at para. 3 (b)(c); *General Comment No. 10*, *ibid.* at para. 3(b).

[199]*Paris Principles*, *ibid.* at para. 3(d).

[200] *List of issues, supra* note 26 at paras 12 - 14.

[201]The Social Rights Sub-committee is modelled, in part, on the provisions the Alternative Social Charter, which the authors of this paper participated in drafting. The Alternative Social Charter was endorsed by a national coalition of anti-poverty and equality seeking groups during the constitutional negotiations leading up to the *Charlottetown Accord* Referendum in 1992. The Alternative Social Charter is discussed and reproduced in Bakan and Schneiderman, *Social Justice and the Constitution*, *supra* note 95, Appendix I at 155.

[202]The issue of whether there should be direct access to the tribunal in general is under review by the CHRA Review Panel. As discussed above, whatever procedure is adopted for the investigation and adjudication of discrimination complaints will apply in the same way to complaints involving the discriminatory denial of social and economic rights.

[203]Like the social rights sub-committee, the social rights panel is modelled, in part, on the provisions of the Alternative Social Charter; see the discussion, *supra* at note 196.

[204]See generally M. Jackman. 1990. "Rights and Participation: The Use of the Charter to Supervise the Regulatory Process."*Canadian Journal of Administrative Law & Practice*. 4: 23; Scott and Macklem, "Constitutional Ropes of Sand," *supra* note 96.

[205]See C. Scott and J. Nedelsky. 1993. "Constitutional Dialogue." *Social Justice and the Constitution*, *supra* note 95 at 59; J. Nedelsky. 1993. "Reconceiving Rights as Relationships." *Review of Constitutional Studies.* 1: 1.

[206]*Vriend*, supra note 52 at 578.

[207]Ken Gray and Hattie Klotz. 1999. "Homeless pregnant woman died of exposure." *The Ottawa Citizen.* March 1.

[208]*Supra* notes 129, 133.

[209]*Concluding Observations, 1999, supra* note 13 at para. 12.

[210]*Supra* note 134.

[211]Margaret Philp. 1998. "Ruling Bars Bias Against Low-income Tenants: Landlords Can't Set Arbitrary Ratios on Rent." *The Globe and Mail.* December 23.

[212]Shelagh Day. *Making the Indivisibility of Women's Human Rights Real* (Commission on the Status of Women 42nd Session, March 2 - 13, 1998).

[213]Martin Scheinin, "Women's Enjoyment of their Economic and Social Rights: Conceptual Framework for the Discussion." United Nations: Division for the Advancement of Women, Expert Group Meeting on Promoting Women's Enjoyment of Their Economic and Social Rights (Turku/Abo, Finland December 1 - 4, 1997) EGM/WESR/1997/BP.1.

[214]*Airey* v. *Ireland*, European Court of Human Rights, Judgment of October 9, 1979, Series A, vol. 32.

[215]*Supra* note 86.

[216]Communications 182/1984 (*Zwaan-de Vries*) and 172/1984 (*Broeks*), Selected Decisions of the Human Rights Committee under the Optional Protocol, vol. 2(1990) at 209 and 196, respectively.

[217]*Supra* note 206 at 8.

[218]*Canadian Human Rights Act Review Panel Consultation Paper.* 1999. Ottawa, *Canadian Human Rights Act* Review Panel, July. Online at www.chrareview.org

[219]*Canadian Human Rights Act* Review Panel: Terms of Reference online at www.chrareview.org

[220]*Supra* notes 27, 28.

[221]*Responses to Supplementary Questions, supra* note 27.

WOMEN'S ECONOMIC INEQUALITY AND THE *CANADIAN HUMAN RIGHTS ACT*

Shelagh Day

and

Gwen Brodsky

[I]ncluding "social condition" in the Canadian Human Rights Act *is a small part of a much broader issue: how to make the link between the overall question of poverty and the effective enjoyment of human rights.*

Michelle Falardeau-Ramsay, Q.C.
Chief Commissioner of the Canadian Human Rights Commission
appearing before the Standing Committee on Legal and
Constitutional Affairs of the Senate of Canada
May 27, 1998

Legislation other than the Charter also protects, and provides remedies for violation of, economic, social and cultural rights, for instance human rights legislation....

Ambassador Mark. J. Moher
Head of the Delegation of Canada before the
UN Committee on Economic, Social and Cultural Rights
Geneva, November 26, 1998

ABSTRACT

The *Canadian Human Rights Act* (CHRA) needs to be modernized and reframed, if it is to be an effective tool for challenging rules and policies that maintain and reinforce women's economic inequality. One proposal under consideration during the current review of the CHRA is adding the ground social condition to the list of prohibited grounds of discrimination. The ground social condition will provide protection from discrimination that occurs because of the negative stereotyping of people with low incomes, in other words, discrimination that occurs because of one's *status* as a poor person or a person receiving social assistance. The ground social condition may be of assistance, for example, if a bank refuses to grant a loan because it assumes, without investigation, that a person on social assistance is a poor credit risk. However, the addition of the ground social condition will not improve the capacity of the CHRA to assist women to address the poverty and economic inequality that are manifestations of long-standing discrimination based on sex, race and disability. The CHRA needs to be reframed so it explicitly recognizes group disadvantage, including the persistent group disadvantage of women, and makes specific commitments to the elimination of women's social and economic disadvantage.

TABLE OF CONTENTS

EXECUTIVE SUMMARY 117

1. INTRODUCTION 119

2. THE GROUND SOCIAL CONDITION 125
   - The Senate Debates 125
   - The Quebec Experience 128
   - Conclusion 132

3. SUBSTANTIVE EQUALITY FOR WOMEN: ADVANCES AND RETREATS IN THE JURISPRUDENCE 134
   - Formal and Substantive Equality 134
   - Advances in the Jurisprudence 136
   - Retreats in the Jurisprudence 142

4. CONCLUSION AND RECOMMENDATIONS 149
   - The Right of Women to Substantive Equality 150
   - Overlapping and Multiple Forms of Discrimination Experienced by Women 152
   - Adverse Effect Discrimination 153
   - Affirmative Responses to Discrimination 153
   - The Right of Women to Substantive Equality Includes Full Social and Economic Equality 154
   - Summary of Recommendations 155

BIBLIOGRAPHY 157

ENDNOTES 163

EXECUTIVE SUMMARY

This report considers the most effective ways of ensuring that the *Canadian Human Rights Act* (CHRA) can assist women to challenge rules and policies that maintain and reinforce their economic inequality. One current proposal is to add the ground social condition to the CHRA. However, the addition of this ground, by itself, will not be sufficient to equip the CHRA to redress women's substantive inequality more effectively.

The CHRA has an important root in the recommendations of the Royal Commission on the Status of Women, made in 1970. The Commission recommended that human rights commissions be established in every jurisdiction that would have the power to enforce human rights laws prohibiting discrimination on a number of grounds, including sex and marital status, and to initiate action, whether or not formal complaints were made. The Royal Commission clearly anticipated that human rights protections would entitle women not just to formal equality, that is, equality in the form of, or on the face of, laws and policies, but to substantive equality, that is equality in actual conditions.

Twenty-five years later, the intransigence of patterns of women's poverty and economic inequality indicate that human rights legislation is a less effective tool than is needed. Women's poverty and economic inequality are manifestations of structural and systemic discrimination based on sex, compounded by race discrimination and discrimination based on disability. Any guarantee of non-discrimination or equality must be able to address the linkage between gender, race, disability and economic inequality, if it is to be successful as a tool for advancing women.

Though the intentions of Parliament may have been different, the CHRA was written as a formal equality document, individually focussed, neutrally worded and based on the assumption that refraining from different treatment of individuals based on their sex, race or other listed grounds would be sufficient to create equality. Over the last 25 years, different understandings have developed through the application of the law in real circumstances: that equality is not a matter of individual same treatment but, rather, a matter of addressing material disparities between groups. In other words, it is the effects of laws and practices, not the presence or absence of facial neutrality, which determines whether they are discriminatory, and affirmative structural responses by governments and others to women's substantive inequality are needed. In the year 2000, it is time for the CHRA to reflect these more sophisticated and current understandings.

Can adding the ground social condition to the CHRA help? The excitement in the language "social condition" is the possibility that it could connote equality of material conditions as distinct from mere formal equality. However, social condition has been a ground of discrimination in the Quebec Charter for 20 years, and it has come to have a very particular meaning. Social condition provides protection from being subjected to negative stereotyping because of being poor, or being on social assistance. Canadians should be protected from

discriminatory conduct based on stereotypes that people with low incomes are untrustworthy, a poor risk, poor tenants, sexually and socially irresponsible, poor parents and worse.

However, this is not all that human rights legislation can and should confer by way of assistance to groups that are socially and economically disadvantaged. The CHRA should also be able to provide an effective avenue for challenging laws and practices that cause, maintain or exacerbate the poverty and economic inequality that are manifestations of long-standing discrimination based on sex, race and disability.

To do this, the CHRA needs to be reframed and redesigned as a law that explicitly goes beyond formal equality. Now it should recognize group disadvantage, including the specific and persistent disadvantage of women, and make an open commitment to the elimination of that disadvantage, in all its forms.

1. INTRODUCTION

Enacted in 1977, the *Canadian Human Rights Act*[1] (CHRA) was intended to be an important tool to assist women to achieve social and economic equality in Canadian society. The Act has an important root in women's struggle to achieve justice.

In 1970, the Royal Commission on the Status of Women made 167 specific recommendations for improving the conditions of women in the areas of economic participation, education, the family, taxation, poverty, public life, immigration and citizenship, and criminal law. However, in addition to making these specific recommendations, the Royal Commission was concerned about ensuring that some new institutions would be created that, after the Commission had finished its work, would have a continuing mandate in order that "women's rights and freedoms are respected."[2] The Royal Commission recommended that human rights commissions be established in every jurisdiction that would be directly responsible to Parliament or the legislatures and have the powers to enforce human rights laws prohibiting discrimination on a number of grounds, including sex and marital status, and to initiate action, whether or not formal complaints were made.[3] Human rights commissions and human rights legislation were conceived by the Royal Commission as mechanisms for addressing, on a continuing basis, the many forms of discrimination against women that it had identified, as well as new forms that might arise. These mechanisms were intended to ensure that, in the future, discrimination against women would be prevented.[4]

It is quite clear from its recommendations, and from the range of concerns canvassed by the Royal Commission on the Status of Women, including women's poverty, that it anticipated human rights protections would entitle women not just to formal equality, that is, equality in the form of, or on the face of, laws and policies, but to substantive equality, that is, equality in actual conditions.

Twenty-five years later, it is important for women to assess whether the federal human rights system is fulfilling these expectations and meeting the needs of women for effective tools to assist them in overcoming their actual conditions of inequality.

It is clear that some advances have been made through human rights legislation. One key advance for women has been the recognition of sexual harassment as a form of discrimination against women.[5] Commissions, tribunals and courts have acknowledged that sexual harassment poisons women's working environments and violates their right to discrimination-free workplaces. Most employers and service providers are aware now that sexual harassment is an unlawful form of conduct, and that they have an obligation to take steps to prevent it and to remedy it when it occurs. Many have adopted policies prohibiting sexual harassment and have designed internal procedures for addressing it. Though sexual harassment has not disappeared, nor is it adequately remedied, it is no longer considered ordinary and acceptable behaviour in the workplace.

It is not so clear, however, that human rights legislation has been effective at addressing other barriers to women's equality in the workplace, or other policies and practices that have the effect of maintaining the status quo of women's economic inequality. In 1999, this is a key concern. As a new millennium begins, the world of work and trade is changing, but women's economic advancement appears stalled. Indeed, there are signs that women's economic conditions are worsening, as the size of government is diminished, and government interventions in the marketplace and family life to ameliorate women's inequality are reduced.[6]

Comparing a few basic indicators from a generation ago to current ones is not encouraging. Women, and particular groups of women, have not made the gains that could be expected during this period of prosperity.

In 1967, women's incomes were 43.2 percent of men's.[7] By 1995, there was some improvement: women's incomes were 58 percent of men's.[8] In 1967, almost half of women 65 and over were living below the poverty line;[9] by 1995, there was a little change—43.4 percent of women 65 and over were living below the poverty line.[10] In 1967, one third of single mothers were living in poverty.[11] In 1995, poverty among single mothers was worse, with 57.2 percent of single mothers under 65 living below the poverty line.[12]

Overall patterns remain substantially unaltered. Occupational segregation by sex remains an important characteristic of the labour force, with work that is traditionally performed by women paid less than work that is traditionally performed by men. Women's full-year, full-time earnings are 72 percent of men's. Women are now performing more non-standard work than men, that is, more work that is part-time,[13] casual, seasonal and without benefits or union protection.[14] And, the high incidence of poverty among women, particularly among Aboriginal women, women of colour, immigrant women, women with disabilities, single mothers and elderly women, is not diminishing. With quasi-constitutional prohibitions against discrimination in employment and services in place for more than two decades, women could reasonably have expected to see more improvement.

The intransigence of these patterns reveals that poverty and economic inequality have a gendered character. There is a strong link between being female and being poor. Women's persistent poverty and general economic inequality are caused by a number of interlocking factors:

- the social assignment to women of the role of unpaid caregiver for children, men and old people;

- the fact that in the paid labour force women perform most of the work in the "caring" occupations and that this "women's work" is lower paid than "men's work";

- the lack of affordable, safe child care;

- the lack of adequate recognition and support for child care and parenting responsibilities that either constrain women's participation in the labour force or double the burden they carry;

- the fact that women are more likely than men to have non-standard jobs with no job security, union protection or benefits;

- the entrenched devaluation of the labour of women of colour, Aboriginal women and women with disabilities; and

- the economic penalties that women incur when they are unattached to men, or have children alone.[15]

To say this a different way, women's poverty and economic inequality are a manifestation of structural and systemic discrimination based on sex, race and disability. Any guarantee of non-discrimination or equality must be able to address the linkage between gender, race, disability and economic inequality if it is to be successful as a tool for advancing women.

This picture is further complicated by the fact that, despite long-standing commitments to women's equality and a recent commitment to analyzing the impact of laws, policies and practices on women,[16] the federal government has made drastic changes to social programs over the last five years that have had disproportionately negative effects on women and increased women's vulnerability to poverty. These changes include the repeal of the *Canada Assistance Plan Act*[17] and the introduction of the Canada Health and Social Transfer,[18] with concomitant cuts to social services, loss of entitlement to social assistance, increase in women's unpaid caregiving workload, loss of women's good jobs in the caregiving sector[19] and amendments to the employment insurance scheme, which have resulted in fewer women being eligible to receive benefits.[20]

The unchanging pattern of women's poverty and economic inequality cannot be squared with Canada's ample economic resources,[21] nor with Canada's multiple human rights commitments. Canada is a signatory to the *International Covenant on Civil and Political Rights* (ICCPR), the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW) and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR).

The ICCPR obliges Canada not only to make broad guarantees of equality in law but also to provide effective protection against discrimination wherever it arises. CEDAW obliges Canada to take "all appropriate measures" to eliminate all forms of discrimination against women "in all fields, including the political, economic, social and cultural fields."[22] The ICESCR obliges Canada as a state party to "take steps...to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the ICESCR by all appropriate means, including...the adoption of legislative measures."[23] The ICESCR guarantees the right of everyone to gain a living by work that is freely chosen, to social security, including social insurance, to an adequate standard of living, including

food, clothing and housing, to the continuous improvement of living conditions, to the enjoyment of the highest attainable standard of physical and mental health, and to education. Also of central importance, under Article 3 of the ICESCR *s*tate parties undertake to ensure the equal right of men and women to the enjoyment of their economic, social and cultural rights, and under Article 2(2) to ensure there will be no discrimination of any kind with respect to those rights.

In its reports to United Nations oversight committees, Canada has consistently asserted that the enactment and enforcement of statutory human rights laws and Charter guarantees are a central means by which Canada fulfills these treaty obligations.[24]

However, over the last decade, Canadians who are members of disadvantaged groups have been concerned about Canada's failure to comply with its international human rights treaty obligations. In November 1998, 10 Canadian non-governmental organizations appeared before the United Nations Committee on Economic, Social and Cultural Rights on the occasion of the Committee's reviewing Canada's third report on its compliance with the ICESCR. These non-governmental organizations presented evidence to the Committee of:

- high and rising rates of poverty in Canada, particularly among vulnerable groups such as Aboriginal peoples, women, single mothers and people with disabilities;

- increasing homelessness and reliance on food banks; and

- retrogressive measures, such as cuts to welfare rates, loss of entitlement to welfare resulting from the repeal of the *Canada Assistance Plan Act* and reduced access to legal aid for family and civil matters.[25]

It was also pointed out that, although claimed by Canada as central mechanisms for protecting economic, social and cultural rights and for providing remedies for violations, the Charter and statutory human rights laws are not effectively performing this crucial function. The concluding observations of the United Nations Committee on Economic Social and Cultural Rights on Canada's Third Report highlighted the contradiction between Canada's wealth as a nation, and the poverty of many of its people. The Committee's criticism was stinging. It found that recent cuts to social programs harmed women. The report also expressed grave concern about the high rates of poverty among women, particularly single mothers. Stating grave concern about the ability of Canada's human rights system to address issues of social and economic inequality and noting, in particular, "the inadequate protection from gender discrimination afforded by human rights laws, and the inadequate enforcement of those laws," the Committee recommended to Canada that:

> 1) [F]ederal, provincial and territorial governments...expand protection in human rights legislation to include social and economic rights and to protect poor people in all jurisdictions from discrimination because of social or economic status; [26] and

2) adopt the necessary measures to ensure the realization of women's economic, social and cultural rights, including the right to equal remuneration for work of equal value.[27]

This squarely raises the question: What is the role of the Canadian Human Rights Commission and the CHRA with respect to persistent patterns of women's poverty and economic inequality? It is possible to come to differing conclusions. For example, some could conclude that the human rights system has nothing to do with these larger patterns of economic inequality; that it can and should deal only with individual instances of unfair treatment; that the larger patterns of inequality in conditions will have to be addressed through other means—through other legislation, economic policy or education, for example. Alternatively, others might conclude that the statutory human rights system should be able to deal effectively with the whole scope of this inequality by itself.

The first of these options renders the statutory human rights system essentially irrelevant to the central problem of inequality that large numbers of women face; the second would make the statutory human rights system the only means of dealing with women's social and economic inequality, subsuming every other form of social and political action that can alter unequal conditions.

Neither of these is a helpful or realistic approach. In our view, there is a middle ground that more accurately reflects the views of the ICESCR Committee and its recommendations. Women should expect that the federal human rights system:

- will be able to address larger patterns of women's inequality, including the economic dimensions of their inequality;

- will not be the only institution through which these patterns of inequality are addressed; and

- will interact with—sometimes complementing, sometimes counteracting—the workings of other institutions in order to move toward the goal of realizing Canada's human rights commitments to women.[28]

What can satisfy these expectations? At the time of this review, there are three related matters to be considered:

- prohibiting discrimination because of social condition or, to use the words of the ICESCR Committee, because of economic and social status;

- improving the capacity of the Act to address poverty and economic inequality that are manifestations of sex, race and disability discrimination; and

- incorporating ICESCR rights into human rights legislation in a more direct way. This paper deals with the first and second of these, and does not deal with the possibility of the more direct incorporation of economic and social rights into the CHRA.

The thesis here is that the proposal made recently in the form of Senate Bill S-11[29] to add "social condition" as a new prohibited ground of discrimination to the CHRA will be of limited usefulness to women seeking to vindicate their right to substantive equality. Social condition has been a ground of discrimination in the Quebec Charter[30] for about 20 years and has been given a restricted meaning, which is likely to be adopted by interpreters of the same language, if it is added to federal human rights legislation. We conclude that the more important and much more complex task, at this time, is to reframe human rights legislation in order to make it a modern and responsive tool to address the inequality of women. This will require incorporating into the Act language that reflects the advances over the last two decades in the understanding of discrimination and how it occurs and, simultaneously, designing ways of dealing with the still outstanding problems in interpretation that are obstacles to women's enjoyment of full equality.

In the year 2000, the CHRA should be able to provide women with an effective avenue to challenge laws, policies and practices that stereotype women because they are poor and cause, maintain or exacerbate women's poverty and economic inequality.

2. THE GROUND SOCIAL CONDITION

What would it mean to add the words "social condition" to the CHRA? How could this serve to advance the equality project for women? Are there limits on the work that such a new ground could be expected to accomplish?

The excitement in the language "social condition" is the possibility that it could connote equality of material conditions as distinct from mere formal equality. This is the sense in which its addition could be most helpful to women. If decision makers were to read "social condition" as an affirmation of the entitlement of women to equality in the actual conditions of their lives rather than the same treatment in the form of legislation, and as an obligation on governments to take affirmative steps to overcome women's de facto inequality, this would be a helpful antidote to the difficulties women face in trying to use equality and anti-discrimination provisions to address their conditions of material inequality.

However, in our opinion, the result of adding "social condition" is likely to be very different and much narrower than this. There are two places to look to discern what can be expected from this new ground: the Senate debates on Bill S-11[31] and the 20 years of experience in Quebec with interpreting and applying this ground.

The Senate Debates

For a number of years now, one option for addressing economic inequality in Canada, proposed by equality-seeking groups and some human rights commissions, has been to include social condition as a new ground of discrimination in the CHRA. Its inclusion was pressed for at the time of the 1997 amendments to the CHRA,[32] but the minister of justice at the time declined to consider it, deciding to focus on a package of other amendments to the CHRA that had been promised for 10 years that dealt principally with disability issues and with the establishment of a permanent tribunal.

In February 1997, Senator Erminie Cohen released a report on poverty in Canada, entitled *Sounding the Alarm.*[33] Having concluded that there is growing income inequality in Canada and that it is not in Canada's interest to ignore the needs of the 20 percent of Canada's population living below the poverty line, Senator Cohen made four recommendations. Two of these related to human rights guarantees. The first called on the federal government to honour the international agreements to which Canada is signatory and which pertain to improving the lives of poor people in Canada and, to that end, develop an action plan for the eradication of poverty within the decade.[34] The second urged "the Parliament of Canada [to] pass a bill to amend the CHRA in order to extend and give legal effect to the principle that everyone should have equal opportunity and to disallow discriminatory practices based on economic status."[35]

On December 10, 1997, Cohen introduced Bill S-11. It was debated in the Senate, with representatives from the National Anti-Poverty Organization (NAPO) and some human rights experts appearing to support it. The Bill was then passed by the Senate on June 9, 1998 and introduced in the House of Commons, where it was defeated in the spring of 1999, with the government stating that it would not support the Senate's Bill because it wished to address the issue of social condition during the overall review of the CHRA.

What did anti-poverty groups, human rights experts and senators hope for from the inclusion of social condition? Two issues were debated during the consideration of Bill S-11.

- What does "social condition" mean, specifically, would the addition of the words "social condition" address poverty per se or would it address the narrower, though important, problem of negative stereotyping of people because they are poor?

- Is social condition an essentially neutral ground, that is, does everyone, rich and poor alike, have a social condition, or does it refer to conditions of disadvantage?

In the limited debate that occurred, there seemed to be acceptance by the central advocates for inclusion of social condition that its effect would be to provide a remedy for discrimination that occurs because a person has a low income, is in receipt of public assistance, is unemployed or is in like circumstances. In other words, the effect would be to prevent a bank from refusing to open an account for a person simply because that individual was on social assistance. The effect would not be to ensure the CHRA provided an avenue for people to take issue with laws and policies that create extreme disparities in wealth and income among Canadians.

This distinction was reflected in the comments of Senator Erminie Cohen, who, when introducing Bill S-11, stated:

> It is with regret that I report to you that poverty continues to be one of the greatest barriers to equality in Canadian society. Poor Canadians live daily with social stigma and negative stereotypes. Financial institutions, landlords, utility companies, the legal system, public and private media and our governments continue to discriminate against our most vulnerable citizens.... *Bill S-11 does not confer any special privileges to Canada's poor. It deals solely with the proscription of discrimination, that is prohibiting a burden. To spell this out even further, I am not proposing that the government make poverty itself a violation of our domestic human rights legislation. Although our complacent attitude about poverty does contradict what we have signed in international fora, I am not suggesting that our domestic human rights legislation be empowered to take our government to task for not providing an adequate standard of living for all of its citizens* [Emphasis added].[36]

Michelle Falardeau-Ramsay, Chief Commissioner of the Canadian Human Rights Commission also indicated the circumscribed role she believed the ground social condition would play. She stated:

> In our view, the inclusion of "social condition" in the CHRA has both a practical and a symbolic impact.
>
> On the practical side, it would make clear to federal employers and service providers that they cannot discriminate against someone, because, for example, they are in receipt of social assistance.... While it is difficult to determine what kinds of complaints our...commission would receive if "social condition" was added to the federal law, I would expect that most would be related to denial of services in such areas as banking, transportation, and telecommunications. We recognize that the Canadian Bankers Association has made an effort to address the issue of banking services for low-income people...but anti-poverty groups continue to express concerns. Just this month, the Quebec media reported problems welfare recipients were having with access to both federally-chartered banks and provincially-regulated Caisses Populaires. There could also be complaints related to deposit requirements by telephone companies. ...
>
> [Also] the inclusion of "social condition" in the Act would have an important symbolic significance. It would give recognition to the idea that differences in economic status are as much a source of inequality in our society as race, gender or disability. ...[P]oor Canadians live daily with social stigma and negative stereotypes and face prejudice similar to those who are discriminated against on the other grounds enumerated in the Act. It is primarily for that reason that I would support this legislation. Adding "social condition" to the CHRA would send the message to Canadians that prejudice against people who are poor is as unacceptable in our society as prejudice against people who are black or aboriginal or disabled or female.

Falardeau-Ramsay added this:

> [I]ncluding "social condition" in the CHRA is a small part of a much broader issue: how to make the link between the overall question of poverty and the effective enjoyment of human rights. Regardless of whether Bill S-11 is adopted, I hope that the review of the CHRA...will explore ways of dealing with questions of economic and social rights in the context of human rights legislation.[37]

Even NAPO, while advocating for the inclusion of the ground social condition, conceded the limitations of the proposal. Fred Robertson, a board member of NAPO, stated:

> [T]he issue here is not poverty itself, but, rather the gratuitous discrimination against the poor. Housing and credit are two major areas in which this occurs. A poor individual may be a far better tenant or credit risk than one with a higher income, but landlords and lenders are free to ignore the individual's character and refuse service, either subtly or brutally, for reasons of insufficient income. Those of us on the receiving end of this treatment understand what a blatant affront to human dignity this treatment is.[38]

It is also clear from the submissions in support of Bill S-11 that Quebec's experience with the ground over the last 20 years would provide instruction as to what "social condition" means, were it included in the federal Act.[39] In short, "social condition" was understood in the Senate debates to refer to discrimination based on socio-economic status.

The other issue raised in the debates about Bill S-11 was whether the ground social condition should be understood to provide protection both to those whose social condition is one of disadvantage and to those whose social condition is one of privilege. Moreover, there seems to have been some disagreement about what the effect would be of leaving the ground undefined. On the one hand, human rights experts like Martha Jackman argued for leaving social condition undefined in order to permit disadvantaged groups to benefit from evolving interpretations. On the other hand, some senators agreed to leave social condition undefined in Bill S-11 to ensure that it would be neutrally applied, that is, that it would not only apply to conditions of relative disadvantage. Senator Grafstein, for example, stated, with apparent approval, that social condition can mean rich or poor, advantaged or disadvantaged. He indicated that he thought this meant that:

> We cannot then discriminate against multimillionaire Conrad Black because of his wealth. We will never be able to do that. I am not saying it jocularly. It is a neutral term and it does not mean a disadvantage. It indicates a condition, a status. It is a neutral statement.[40]

The Senate rejected a proposal to include a definition of social condition in its Bill that would link social condition to disadvantage. The proposed definition was: "'social condition' includes characteristics relating to social or economic disadvantage."

There may be ways, other than defining this particular ground, of clarifying that a ground such as social condition refers to social and economic disadvantage. What is certain, however, is that if it is included in the Act, it cannot be a ground that is understood to be neutral. To fulfill its purpose, those who are disadvantaged because of their social and economic circumstances must be understood to be its intended beneficiaries.

The Quebec Experience

In the absence of a clear legislative definition interpreting the ground social condition as a reinforcement of the right of women to substantive equality, it is very probable that decision

makers will look to existing case law, particularly that of Quebec, because Quebec is the sole jurisdiction that includes the ground social condition in its human rights legislation.

Article 10 of the Quebec Charter states:

> Every person has a right to full and equal recognition and exercise of his human rights and freedoms, without distinction, exclusion or preference based on race, colour, sex, pregnancy, sexual orientation, civil status, age except as provided by law, religion, political convictions, language, ethnic or national origin, "*social condition*", a handicap or the use of any means to palliate a handicap.
>
> Discrimination exists where a distinction, exclusion or preference has the effect of nullifying or impairing such right.

The protection against discrimination based on social condition in the Quebec Charter is not explicitly limited to the status of being a social assistance recipient, and neither is it limited to tenancy, but rather applies throughout the Charter. Therefore, one would expect to see cases involving a wide range of circumstances. However, a review of the cases reveals that the pattern in Quebec is remarkably similar to other jurisdictions which prohibit discrimination on the ground of "receipt of social assistance" or "source of income." Although the Quebec cases leave open the possibility that someone other than a person on social assistance could claim social condition discrimination, so far every successful complainant has been a person on social assistance. And almost all the cases in which complainants have succeeded are about discrimination in rental accommodation. In most cases, the complainants are women with children. The discrimination they experience is frequently blatant, and explicitly based on the woman's status as a social assistance recipient.

For example, in the case of *Québec (Comm. des droits de la personne)* v. *Ianiro,*[41] a tribunal found that the respondent refused to rent an apartment to Francine Gilbert on the basis of her social condition, contrary to the Quebec Charter. At the time of the events in question, Ms. Gilbert had recently obtained a divorce and had custody of her three young children. The respondent refused to rent the apartment to Ms. Gilbert and did not take the time to check her references.

The respondent alleged that the only reason for the refusal to rent was that he did not wish to rent to a person who might break the lease after five or six months. The Tribunal found that there were no objective reasons to support this apprehension. There was no evidence to show that Ms. Gilbert would not respect her obligations. Moreover, the respondent's son had said to Ms. Gilbert at the time of the refusal that "he did not want to have welfare recipients as tenants."[42]

Similarly, in the case of *Québec (Comm. des droits de la personne)* v. *Whittom*[43] the Tribunal held that Johanne Drouin had been discriminated against directly based on her social condition and indirectly based on her civil status as a single parent when she was refused

accommodation because the landlord assumed she would not be able to pay the rent. The Tribunal found that it was contrary to the Quebec Charter to refuse to rent to poor people, and in particular those whose main source of income was welfare, on the basis of their low-income level, without first considering whether the individual was likely to be a reliable tenant.

The Tribunal reasoned that Ms. Drouin was discriminated against indirectly because of her status as a single mother because the landlord assumed that Ms. Drouin's income was not high enough, and this, while not directly related to the fact that her family was a single-parent family, "necessarily had the effect of affecting this type of family in particular, since this type of family, especially if it is headed by women, is the poorest in the society."[44]

The Tribunal said:

> Deciding not to rent to a person because his [or her] income is insufficient, without finding out anything else about the person...is taking a decision that contravenes the prescriptions of s. 10 of the Charter when the...refusal to rent affects a poor person whose income is derived mainly from social benefits. The decision not to rent presupposes that the poor person cannot in effect pay the rent and stigmatizes him [or her] by taking into account one of the main elements of "social condition", that is the financial categorization of a person and the place he [or she] holds in the society. This categorization of the financial situation of a person, one of the specific facets of "social condition", involves prejudice and contempt.[45]

The Quebec Court of Appeal confirmed the Tribunal decision in *Whittom*, holding that the respondents had discriminated against Johanne Drouin on the basis of her social condition when they refused to rent her an apartment.[46]

The Court found that the refusal to rent to Ms. Drouin was based on a superficial assessment of her ability to pay the rent. The Court noted that the evidence showed that, had the appellants taken the time to make some inquiries, they would have found that Ms. Drouin had never been in default of her monthly payments, even though her previous rent was similar to that requested by the appellants. By not renting the apartment to Ms. Drouin, the Court found, the landlord had discriminated by preventing her from fully exercising her right to execute a legal act, that is, to enter into a lease contract.[47]

There have been a number of cases that are factually similar to *Ianiro* and *Whittom,* mainly involving women with children who are receiving social assistance, in which Quebec tribunals have made consistent holdings.[48]

There have also been some cases alleging discrimination in employment. There is only one case in which the plaintiff was successful. In the case of *Lambert* v. *Québec (Ministère du tourisme) (No. 3)*[49] a Quebec tribunal held that Franck Lambert was discriminated against on the basis of social condition because, pursuant to a legislatively sanctioned workfare

agreement, Mr. Lambert received only his social assistance payment while he worked full time at the Department of Tourism's photo library. He was denied minimum wage and other benefits required by labour standards legislation. At the time of writing, the *Lambert* decision was under appeal. This is a decision that has the potential to be important in other jurisdictions where participation in workfare programs is a condition of receiving social assistance.[50]

In the area of services, there has been one successful complaint of discrimination based on social condition. The Quebec Tribunal found that a refusal by a financial institution to consider a mortgage application from a welfare recipient constituted discrimination based on social condition.[51] The complainant, Francine D'Aoust, was a single mother receiving social assistance. The Tribunal found that Ms. D'Aoust had sufficient means to qualify for a mortgage loan. This is also an important decision because access to credit and the most basic of banking services, including cashing government cheques, is a widespread problem for people receiving social assistance. Moreover, banks are covered by the CHRA.[52]

As we have noted, most of the Quebec cases deal with tenancy, which is principally a matter within provincial rather than federal jurisdiction. For the purposes of our assessment, however, this is not what concerns us. We believe there are many instances of social condition discrimination that arise within federal jurisdiction, including, for example, women who are receiving social assistance being refused employment by federal sector employers because they are perceived to be poor, untrained and "not workforce material."[53]

Instead, our concern is that, although important, the Quebec cases in which complainants have been successful suggest a limited content for the ground itself. It is clear from the Quebec cases that the right to be free from discrimination based on one's social condition is not understood to give rise to a right to challenge policies and practices that cause, maintain or exacerbate a person's poverty, but rather as a right to have one's status as a social assistance recipient or a person with a low income disregarded by landlords, service providers and employers. Could the term "social condition" be pushed further? Without a new legislative definition, this is doubtful.

The meaning of the term "social condition" was extensively canvassed by the Tribunal in *Whittom*. The Tribunal explained that "social condition" was first defined by Tôth, J. who said:

> [I]n popular speech, "social condition" refers to the rank, place, position that a person holds in our society, through birth, income, level of education, occupation; all the circumstances and events that mean a person or group has a certain status or position in society. The Tribunal agrees with this statement. [54]

The Tribunal in *Whittom* noted that in *Gauthier*[55] "social condition" was defined as:

> ...the status of a person in a community, in particular, through his origins, level of schooling, occupation or profession and income, and through the perceptions and representations which, within the community are associated with those objective data.[56]

The Tribunal also said:

> The Courts have also several times affirmed that level of income was definitely one of the elements of "social condition", although it is not the income itself that is an element of "social condition" but the consequences resulting from the income, that is, the *place* the person holds in society because of his [or her] income[57] [emphasis in original].

The Tribunal in *Gauthier* found that welfare recipients represent a distinct and socially identifiable group in society and that membership in the group often leads to stereotypes and prejudice against individual members of the group.

In *Québec (Comm. de la personne)* v. *Briand,*[58] Sheehan, J. stated:

> A person's "social condition" can follow from several elements, such as level of education, employment, lack of all kinds of resources and even from family origins. It is not necessary that the prohibited distinction, exclusion or preference take into account each of these elements for it to create discrimination based on "social condition". It is enough that the distinction rests on one important aspect of a person's situation in society. It is also not necessary that the "social condition" is the "only" reason for the prohibited distinction, exclusion or preference. As well, it is not necessary that all welfare recipients are targeted by the exclusion.[59]

Conclusion

Cases, such as *Whittom, Gauthier* and *Guay*, indicate judicial concern about the treatment of people on income assistance, and insight concerning the poverty of women, but do not offer analyses that can be of assistance in addressing the interaction between the condition of being female and the condition of being poor. Based on the judicial interpretations of social condition, it must be concluded that the assistance women would derive from an amendment adding the ground social condition to the CHRA is limited.

The Quebec cases show that, so far, the usefulness of the ground social condition is limited for the following reasons.

- The elements that have been identified as creating a person's inferior social condition do not include female sex, aboriginality, non-white race and disability.

- The ground has been restricted to addressing negative categorization and stereotyping based on social condition and specifically defined as *not* addressing the material conditions of poverty and economic inequality per se, including those that result from discrimination.

- The ground has been defined neutrally, so every person is understood to have a social condition. This neutrality has permitted a doctor and a judge, in different cases, to use the ground social condition to defend against claims of social condition discrimination made by others.[60]

Without question, poor Canadians should be protected from discriminatory conduct based on stereotypes that people with low incomes are untrustworthy, a poor risk, poor tenants, sexually and socially irresponsible, poor parents and worse. However, this is not, in our view, all that human rights legislation can or should confer by way of assistance to groups disadvantaged socially and economically.

As stated at the outset, we believe the test against which proposals for CHRA reform must be measured is: Will the amendments provide women with an effective avenue to challenge laws and practices that stereotype them because they are poor and/or cause, maintain or exacerbate their poverty and economic inequality? In our view, although adding the ground social condition could go some distance toward satisfying the first element of this test, it cannot, on its own, satisfy the second element.

Furthermore, if nothing else is done in the Act to signal that women's economic inequality is not consistent with guarantees of equality and non-discrimination, including the ground social condition could, in our view, be misleading and hazardous. We say this because constructing a ground that addresses only the discriminatory conduct poor people experience because of the *status* of being poor may make it more difficult to engage with the larger problem of the linkage between economic inequality and gender, ancestry, race and disability. It may send the message that the only thing human rights legislation is expected to address is the negative stereotyping of poor people because they are poor, and not the seemingly neutral distinctions that have the effect of relegating women and others to the ranks of the poor and the economically inferior. Second, it may imply to adjudicators that the other grounds—sex, ancestry, race and disability—are not intended to deal with the economic inequality that is experienced by women, Aboriginal people, people of colour and people with disabilities as a result of discrimination against them. Adjudicators may assume that any issue of economic inequality belongs in the box marked "social condition" and that it is a small box that only concerns negative categorization because of the *status* of being poor.

3. SUBSTANTIVE EQUALITY FOR WOMEN: ADVANCES AND RETREATS IN THE JURISPRUDENCE

Since adding the ground social condition to the CHRA will not necessarily improve its capacity to advance the substantive equality project for women, the next question is: What will?

Though the expectation at the time the CHRA was introduced was that it would be a tool for addressing long-standing patterns of women's economic inequality, in effect, the statute was not designed to deal with those patterns, perhaps because group or structural inequality was not well understood at the time. The legislation was drafted in primarily formal equality terms. Over the last two decades, the concept of formal equality has been increasingly found inadequate when applied to the real cases of discrimination brought before adjudicators, and the meaning of the prohibitions in the statute have been, to some extent reshaped, as the law has been applied. In some key decisions during this period, tribunals and courts have gone well beyond consideration of the form of laws and policies and have designed new principles for analyzing inequality.

However, the idea that equality rights guarantees and human rights laws should address substantive disparities between groups is relatively new. The individualistic, formal idea of equality which has prevailed in our legal system for centuries is still more familiar, albeit outdated and inadequate. Because of this, interpretive problems continue to exist and the application of the concept of substantive equality is still uncertain, particularly in cases where the linkage between female gender and economic inequality is at issue.

We believe the statute should be rewritten now to incorporate the advances made through the application of the law over the last two decades and to correct identifiable interpretive problems.

Before describing the advances and the outstanding problems, however, it is important to state what we believe the differences are between the concepts of formal equality and substantive equality, since it is our view that substantive equality concepts should be clearly written into the statute now.

Formal and Substantive Equality

In formal equality theory, it is assumed that equality is achieved if a law, policy or practice treats likes alike. For example, if it is assumed that men and women are alike, an absence of different treatment in the form of the law, policy or practice, together with its universal application, are thought to make men and women equal.

Closer examination of formal equality reveals it is not just one concept but rather a package of interlocking puzzle pieces, which together, function to both conceal and legitimize the

oppression of marginalized groups in the society. The formal equality framework is characterized by:

- acceptance of the highly mechanical Aristotelian formulation that things that are alike should be treated alike, while things that are unalike should be treated as unalike in proportion to their unalikeness;

- a refusal to see that equality is actually a question of *in*equality, that is, of dominance and subordination between groups in the society;

- a refusal to see that relations of inequality between groups are sustained by government inaction as well as by government action;

- a propensity to place many forms of inequality in a realm, such as the family or the market, that is categorized as "private," beyond the reach and responsibility of government;

- a central normative commitment to a policy of blindness toward personal characteristics thought to be out of the control of the individual, such as genitalia and skin colour;

- resistance to dealing with discrimination relating to a category of stigmatization concerning which there may be a significant element of choice, such as being lesbian, or which, like poverty, is not readily reduced to personal characteristics analogous to skin colour;

- an incapacity to deal with the adverse effects of facially neutral laws or policies;

- an understanding of discrimination, not as systemic, but rather as consisting of explicit, differential treatment;

- a tendency to individualize everything so patterns of group-based oppression and subordination are rendered invisible; and

- a conception of government as always a threat to individual liberty and not as a significant actor in creating the conditions necessary for human flourishing.

In contrast, a substantive equality framework for human rights adjudication reflects the following insights:

- Equality is not a matter of superficial sameness and difference, but rather a matter of inequality, that is, dominance, subordination and material disparities between groups.

- It is the effects of laws, policies and practices, not the absence or presence of facial neutrality, which determine whether they are discriminatory.

- Addressing inequality between groups requires government action.

- The so-called "private" realms of the family and the marketplace cannot be set outside the boundaries of equality inquiry or obligation, because they are key sites of inequality.

- Neither liberty nor equality for individuals can be achieved unless equality is achieved for disadvantaged groups.

- It is essential to be conscious of patterns of advantage and disadvantage associated with group membership.

- The test of equality is not whether an individual is like the members of a group that is treated more favourably by a law, policy or practice, but whether the members of a group that has historically been disadvantaged enjoy equality in real conditions, including economic conditions.[61]

Some of these substantive equality insights are articulated in the jurisprudence of the last 20 years. We refer to both human rights and s. 15 Charter cases since the principles of interpretation are shared and mutually reinforcing.

Advances in the Jurisprudence

There are important jurisprudential developments over the last 25 years in both human rights and Charter interpretation which have given life to the minimalist language of the CHRA and provincial human rights laws. During this period, courts and tribunals established principles of interpretation intended to encourage adjudicators to deal in a sophisticated and socially sensitive way with the substantive inequality of women and other disadvantaged groups.

On key points, understandings have changed since the CHRA was first introduced. There is wide acknowledgement now that women's inequality has historic roots and structural dimensions. There is an understanding that discrimination is not simply a matter of the bigoted behaviour of individuals. Rather, it is principally the "normal" functioning of central institutions which perpetuates the inequality of women and other disadvantaged groups. Remedying the actual conditions of women's inequality will require changing how those institutions function.

Basic principles that have been recognized in the jurisprudence include:

- that women's inequality has group dimensions;

- that sex inequality is a problem experienced by women as a group, not men as a group;

- that grounds are not rigid, watertight compartments, but have softer boundaries and often intersect with each other;

- that affirmative structural responses by governments and others to women's substantive inequality are needed; and

- that adverse effect discrimination requires effective response.

Group Dimensions

In the jurisprudence, the group dimensions of women's inequality have been recognized. They were clearly recognized by the Supreme Court of Canada in *CN Rail*, in *Brooks* and in *Janzen*.[62] In *CN Rail*,[63] which concerned an entrenched pattern of discrimination against women applying for, and employed in, blue-collar jobs with the railway, the Supreme Court of Canada defined the issue before it as "whether a human rights tribunal...has the power under s. 41(2)(a) [of the *Canadian Human Rights Act*] to impose upon an employer a programme tailored specifically to address the problem of systemic discrimination in the hiring and promotion of a disadvantaged group, in this case women."[64] It noted further that the complaint was not "that of a single complainant or even a series of individual complainants; it was a complaint of systemic discrimination practiced against an identifiable group."[65]

The Court found that it was an uncontradicted fact that discrimination against women had deep roots at CN. Women were discriminated against at the time they applied for jobs. They were also required to take discriminatory tests, required to have unnecessary qualifications and harassed on the job if they were hired. Taken altogether, CN's practices amounted to a systemic denial of equal opportunities for women.[66] The Court concluded that a systemic remedy directed toward women as a group, including a specific requirement that CN hire one woman in every four new hires until the representation of women in blue-collar jobs in the St. Lawrence region reached 13 percent,[67] was necessary in the circumstances to prevent future discrimination. In this important case, the Court recognized that discrimination against women has group dimensions and requires a group-based remedy.

In *Janzen* v. *Platy Enterprises,*[68] the Supreme Court of Canada recognized that, though both perpetrators and victims of sexual harassment can be either male or female, "in the present sex-stratified labour market, those with the power to harass sexually will predominantly be male and those facing the greatest risk of harassment will tend to be female."[69] The Court held that when sexual harassment occurs in the workplace, it is an abuse of both economic and sexual power.[70] Women are most vulnerable to it because they tend to occupy low-status jobs in the employment hierarchy, and because sexual harassment is used in a sexist society to remind women of their inferiority to the dominant male group.[71]

The Supreme Court also specifically rejected the reasoning of the Manitoba Court of Appeal in this case, which individualized and de-gendered the problem of sexual harassment. The Court of Appeal decided that the real cause of sexual harassment was the physical

attractiveness of the individual victim, rather than her membership in the group women. However, the Supreme Court rejected this. It found instead that sexual harassment does not occur solely because of the physical attractiveness of the victim, and that any female employee at the restaurant owned by Platy Enterprises was a potential victim of Grammas, the harasser, and as such was disadvantaged because of her sex.[72]

In *Brooks* v. *Canada Safeway*[73] the Supreme Court of Canada dealt with a disability plan that denied benefits to pregnant women. The Court, in finding that the plan discriminated on the basis of sex, recognized that women as a group are placed at an unfair disadvantage when they are made to bear the costs of pregnancy. The Court said:

> It cannot be disputed that everyone in society benefits from procreation. The Safeway plan, however, places one of the major costs of procreation entirely upon one group in society: pregnant women.... Removal of such unfair impositions upon women...is a key purpose of anti-discrimination legislation.[74]

These cases stand for the principle that women, as a group, experience discrimination and entrenched forms of disadvantage, and recognize that a key purpose of human rights legislation is the removal of barriers to women's equality.

Sex Inequality as a Problem of Women

Brooks recognized that women, as a group, are disadvantaged by policies which do not alleviate the social and economic burden of childbearing, but instead reinforce it. *CN Rail* recognized that women, as a group, experience sex inequality with respect to access to non-traditional jobs, and *Janzen* recognized that women, as a group, are more vulnerable to sexual harassment because of unequal power relations between men and women.

In Charter jurisprudence, the Supreme Court of Canada has recognized that women generally occupy a disadvantaged position in society relative to men. In the case of *Weatherall,*[75] the Court specifically repudiated a claim by men that, as a group, they were discriminated against because of their sex by a policy which permitted women guards in some circumstances to do frisk searches and cell checks of male prisoners, while men guards were not permitted to do frisk searches of women prisoners or to check cells when the women might be undressed. In this case, the Court said:

> Given the historical, biological, and sociological differences between men and women, equality does not demand that practices which are forbidden where male officers guard female inmates must also be banned where female officers guard male inmates. The reality of the relationship between the sexes is such that the historical trend of violence perpetrated by men against women is not matched by a comparable trend pursuant to which men are victims and women the aggressors. Biologically a frisk search or surveillance of a man's chest area conducted by a female guard does not implicate the same concerns as the same practice by a male guard in relation to a female inmate. Moreover,

> women generally occupy a disadvantaged position in society in relation to men. Viewed in this light, it becomes clear that the effect of cross-gender searching is different and more threatening for women than for men.[76]

Grounds Are Not Rigid, Watertight Compartments

In some cases, grounds have been interpreted as though they were rigid, watertight compartments.[77] In cases where more than one ground has been pled, adjudicators have applied grounds serially, deciding first whether there is sex discrimination, and then whether there is race discrimination.[78]

Nitya Iyer notes that the treatment of grounds in this way—as rigid, watertight compartments—distorts women's experiences, and in the case of women of colour, analogizes them to what would have happened to raceless women or genderless racial minorities.[79] Iyer explains that the treatment of grounds as watertight compartments makes discrimination against the most disadvantaged women disappear.[80] Only if the particularities of their experiences as Aboriginal women, or immigrant women, or women with disabilities are examined fully can they be understood and remedied appropriately. Iyer also notes that where a race claim is made along with another ground, because of judicial resistance to making findings of race discrimination, race is often treated as secondary or is not addressed at all if the other ground of discrimination is established. This forecloses the opportunity for developing jurisprudence about race discrimination[81] and for public examination of the realities of racism. The point here is that, unless grounds are treated as richly interactive, the disadvantages of the most disadvantaged women will be neither seen nor addressed.

In *Dartmouth/Halifax County Housing Authority* v. *Sparks,*[82] the Nova Scotia Court of Appeal handled the intersectionality of grounds deftly, recognizing the interaction of the grounds race, sex and income. It ruled that tenants of public housing, as a group, were discriminated against because they were not afforded the protections of the *Residential Tenancies Act*[83] if their tenancy was terminated. The Court, in that case, found that tenants in public housing were predominantly black single mothers receiving social assistance. The Court said: "The public housing tenants group as a whole is historically disadvantaged as a result of the combined effect of several personal characteristics listed in s. 15(1)."[84]

In its recent decision in *Law,*[85] the Supreme Court of Canada recognized that a discrimination claim can posit an intersection of grounds that are a synthesis of grounds listed in s. 15(1) or analogous to them. It immediately applied this in the case of *Corbière.*[86] At issue in this case was a provision of the *Indian Act*[87] which bars members of a band who live off-reserve from voting in band elections. The Court found that the group experiencing differential treatment was Aboriginal people who are band members but live away from their reserves. Though this combination of traits did not fall under one of the listed or already recognized analogous grounds, the Court held that the exclusion of off-reserve band members from voting was based on a new ground that is a combination of existing and analogous grounds, namely, "aboriginality-residence."[88] L'Heureux-Dubé, J. noted that Aboriginal women are particularly affected by the bar to voting by off-reserve band members because of the history of their

involuntary loss of Indian status. Many Aboriginal women who lost their status because of s. 12(1)(b) of the *Indian Act*[89] and who have regained that status through Bill C-31[90] live off-reserve, because they had no choice but to leave the reserve when they lost their status. This approach to grounds permitted the Court to consider specifically the characteristics of the group in question, and to examine fully the nature of their disadvantage.

Effective Responses to Adverse Effect Discrimination

The ability and willingness of investigators, tribunals and courts to analyze fully adverse effect discrimination and respond to it effectively may be the most important factor now that determines whether human rights guarantees will advance the substantive equality of women. Most facially obvious gender distinctions in the text of legislation and policies have been eliminated. However, this does not mean that discrimination has disappeared. On the contrary, it means that now we are getting to the hard part, to the discrimination that is embedded, ignored and accepted.

Early in the application of human rights legislation, tribunals and courts decided that same treatment was an inadequate definition of equality, and that discrimination must be recognized by the effect on the victim, not by the intent of the perpetrator. The Supreme Court of Canada first recognized adverse effect discrimination in 1985 in the case of *O'Malley.*[91] Theresa O' Malley alleged that she was discriminated against with respect to employment because of her creed. The impugned rule was a requirement that all employees work on Saturdays on a rotating basis. O'Malley was a Seventh Day Adventist and her religion required her to observe a Sabbath from sundown Friday to sundown Saturday. Her employment was terminated because of her refusal to work on Saturdays. The Court held that Simpsons-Sears discriminated against O'Malley on the basis of creed, distinguishing in its decision between direct discrimination and adverse effect discrimination. Direct discrimination, the Court said, refers to practices or rules which discriminate on their face, such as "No Catholics or no women or no blacks employed here."[92] By contrast, adverse effect discrimination arises where an employer, or service provider, adopts a rule or standard which is neutral on its face and applies equally to all, but which has a discriminatory effect on an individual or a group because it imposes on them obligations, penalties or restrictive conditions not imposed on others.[93] The Court found there was an obligation on the employer to "accommodate" Ms. O'Malley's religion because of the adverse effect on her of the attendance rule.

In its first decision interpreting s. 15 of the Charter,[94] *Andrews* v. *Law Society of British Columbia,*[95] the Supreme Court of Canada imported into s. 15 the human rights principles it had shaped over the previous decade. The Court endorsed a concept of discrimination focussed on adverse effects, and confirmed there is no requirement for proof of intent to discriminate.[96] In its recent decision in *Law*, the Court summarized its holdings of the first decade of s. 15 analysis and reiterated its earlier rulings that proof of legislative intent is not required to found a s. 15 claim.[97] A claimant's onus will be satisfied by showing that the effect of the law is discriminatory.[98]

That discrimination can occur through the adverse effects of neutral-seeming rules or policies is an accepted principle of law in Canada now. However, tribunals and courts are still struggling with the effective application of this principle in sex equality cases and, for women, achieving substantive equality hangs in the balance.

The Need for Affirmative Structural Responses

Can equality be achieved through refraining from discriminatory practices, or is positive action required by governments and private actors to achieve it? Increasingly, human rights decision makers do not accept that inaction is a sufficient response to a complaint of discrimination, even though counsel for respondents sometimes argues that it is. In the case of *Huck*,[99] for example, a movie theatre was found to have discriminated against Michael Huck based on his disability because of its failure to make it possible for him to enjoy the service provided. Mr. Huck, who had muscular dystrophy and used a motorized wheelchair, was refused service unless he agreed to sit in front of the front row of seats. The theatre argued that it provided him with the same service as others, and if he could not enjoy it in the same way that was the fault of his disability, not of the theatre. The Saskatchewan Court of Appeal rejected this reasoning, and the theatre was required to alter its seating arrangements in order to provide patrons with disabilities with some choices regarding where in the theatre they would sit.

The concept of accommodation, first recognized in *O'Malley*,[100] is not just an acknowledgement that identical treatment does not always produce equality; it is also a recognition that merely refraining from discriminatory conduct is not sufficient to fulfill the goals of human rights legislation. When members of disadvantaged groups are negatively affected by discriminatory rules, positive measures are required to eliminate the discrimination.[101]

In *Eldridge*,[102] the Supreme Court of Canada held that where sign language interpreters for deaf people are necessary for effective communication in the delivery of medical services, failure to provide them constitutes a violation of s. 15 and is not saved by s. 1. The Court specifically rejected the argument that s. 15 requires only that people be treated the same and does not obligate governments to ensure that disadvantaged members of society have the resources necessary to take advantage of public benefit programs. Writing for a unanimous Court, LaForest, J. said, "In my view, this bespeaks a thin and impoverished vision of s. 15(1)."[103]

In *Vriend,*[104] the Supreme Court of Canada held that the omission of the ground sexual orientation from the Alberta *Individual's Rights Protection Act*[105] violated s. 15 of the Charter because it had a disproportionate impact on gays and lesbians as opposed to heterosexuals, depriving them of both legal protections and recognition of their human dignity that, given the social reality of discrimination against them, they clearly need.

Thus, in these recent cases, the Supreme Court of Canada has taken the important step of recognizing that governments have a responsibility to act to overcome disadvantage. Inaction

and legislative silence cannot be assumed to be neutral or non-discriminatory. A court or tribunal can only determine whether inaction is non-discriminatory by considering the impact of inaction or silence on a particular disadvantaged group.[106]

Further, the message that governments and others do not have positive obligations does not conform with undertakings Canada has made as a signatory to international human rights treaties. For example, as a state party to CEDAW, Canada has undertaken to "take all appropriate measures" to eliminate discrimination against women "in all fields including the political, economic, social and cultural fields."[107] CEDAW contemplates that state parties will pass legislation and also take other measures to ensure the practical realization of the principle of equality for women.[108] Obligations are placed first on governments; but those obligations extend to ensuring that discrimination against women by "any person, organization or enterprise" is eliminated.[109]

In short, the idea that achieving equality is, in the main, a prohibitory endeavour does not square with emerging jurisprudence or the commitments that Canada has made pursuant to international human rights treaties.

Retreats in the Jurisprudence

Even though courts and tribunals have said repeatedly that determining whether a given policy or practice is discriminatory is primarily a question of assessing adverse effects, rather than a search for discriminatory intention or differential treatment, the usefulness of this theoretical development is uncertain because of the difficulties some courts and tribunals have had when faced with women's claims of adverse effect discrimination.

Although there is widespread acceptance of the principle that women are entitled to substantive equality, and not mere formal equality, decision makers remain locked into a mind set about discrimination that is rooted in formal equality thinking. The lack of clear language in the CHRA and other human rights statutes affirming an intention to assist women in overcoming conditions of actual inequality means that human rights legislation is not serving as a helpful corrective. As a result, efforts to use human rights legislation to address the economic inequality of women are being blocked.

In human rights case law, one significant manifestation of the persistence of formal equality thinking is an entrenched assumption that if a rule looks neutral it must also be neutral in its effects. This assumption is reflected in the decision of the British Columbia Court of Appeal in a case called *Meiorin*.[110] At issue in *Meiorin* was an employment requirement that forest fire fighters run 2.5 kilometres in less than 11 minutes. The group used to develop the test standard was predominately male forest fire fighters. The effect of the test standard was to exclude most women, including Tawney Meiorin whose time, although rated by experts as indicative of excellent fitness, was 49 seconds over the standard of 11 minutes.

A grievance arbitrator found the test standard was discriminatory, based on its adverse effects on women,[111] not justified by evidence of safety or efficiency risk, and ordered Tawney Meiorin reinstated. However, the British Columbia Court of Appeal disagreed. The Court stated, "if individual testing is carried out there is no discrimination."[112] The Court came to this conclusion based on the outdated notion that the exclusive paradigm of discrimination is wrongful stereotyping of "an individual solely on the basis of association with a group,"[113] and that "individual testing is inherently non-discriminatory" because it assesses an individual's "merits" and "capacities."[114] While the Court was correct in recognizing that discrimination can result from wrongful stereotyping of an individual woman based on assumptions about the abilities of women in general, this is an incomplete formulation. Sex discrimination may also result from the incorporation of male norms into neutral-seeming rules, notwithstanding that each candidate is tested individually. In the Supreme Court of Canada, an intervenor, the Women's Legal Education and Action Fund (LEAF), put it this way:

> The concept of "merit" and "ability" to do a job is not neutral. By definition, "merit" and "ability" to do a given job encompass the existing ways of working. In a formal equality approach the analysis stops at the point of "fitting" into the existing model. However, substantive equality requires that the norms underlying a specific definition of ability be challenged.[115]

Meiorin demonstrates the persistence of a highly individualistic model of discrimination that was never intended to deal with group disadvantage.

Another manifestation of the continuing influence of formal equality thinking on human rights adjudication is the insistence on narrow biological comparisons. To prove sex discrimination, it must be shown that women or men are differently affected by a rule or policy because of their different biological characteristics.

That is the paradigm of sex discrimination that underlies the decision of the Federal Court of Appeal in *Thibaudeau*[116] in which Hugessen, J.A., writing for the Court, reduced the human rights ground sex purely to a matter of biological difference, with the result that the sex discrimination claim was defeated. At issue in *Thibaudeau* was the provision of the *Income Tax Act* which required custodial parents, 98 percent of whom are women, to pay tax on child support payments they received, while another provision of the Act made such payments tax deductible for the payor non-custodial parents, most of whom are men. Although Hugessen, J.A. recognized that within the negatively affected group women were the overwhelming majority, he viewed this as insufficient to found a claim of sex discrimination because two percent of the negatively affected group were men.

It was not just that the presence of men in the group was seen by the Court as diluting the pool of affected individuals such that the burden of proving adverse effects on women was not discharged. Rather, the fact that some men could be affected was taken by the Court as fundamentally inconsistent with the allegation of sex discrimination. The Court saw it as breaking the necessary "causal connection"[117] between the ground sex and the distinction in

treatment resulting from the *Income Tax Act*. In the Court's analysis, the fact of custodial parents being overwhelmingly women assumed no importance, as though it was merely coincidental and not inextricably related to "'hidden power relations' which assign to women primary responsibility for childcare in Canadian society."[118]

Hugessen, J.A. reasoned that:

> A male is always the opposite of a female and *vice versa*. Women or any sub-group of women who claim that a law discriminates on the basis of sex necessarily do so because it draws a distinction based on their shared characteristic of femaleness which it does not draw for those who have the opposite characteristic of maleness.[119]

The examples of femaleness and maleness provided by Hugessen, J.A. were of "being pregnant or having prostate cancer."[120] The difficulty with this narrow biological approach is what it leaves out. Excluded from this understanding of sex discrimination is an appreciation of the socially subordinating consequences of femaleness, including economic inequality, which provide the necessary context for understanding how and why a facially neutral system such as the inclusion/deduction system of the *Income Tax Act* affects women as a group differently from men as a group.

In the view of Hugessen, J.A., to succeed on a claim of adverse effect sex discrimination women would have to show that the challenged provision had a *qualitatively* different effect on women than on men. He said:

> The focus, surely, is not on numbers but on the *nature* of the effect; on the quality rather than the quantity. If legislation which adversely affects women has the *same* adverse effect on men, even though their numbers may be smaller or the likelihood of their suffering may be less, it cannot logically be said that the ground of discrimination is sex.[121]

However, it is clear that the inclusion/deduction system did have particular adverse effects on women, because of the situation of single mothers but, without a socially contextualized conception of sex discrimination, those effects can be difficult to perceive. Lisa Philipps and Margot Young[122] explain it this way:

> Had Hugessen J.A. given appropriate contextualized consideration to the effect of s. 56 in *Thibaudeau*, what would he have found? A number of things seem obvious. Female custodial parents face a hostile world. They are disadvantaged in terms of labour force participation and access to education and training opportunities. Their skills and labour are less valued than those of male custodial parents. This is in large part because, as women, they are already embedded in society-wide patterns of disadvantagement and prejudice. Male custodial parents, while they may share some of the immediate disadvantages which are imposed on separated custodial parents, like section

> 56(1)(b), do not share this larger context of gender disadvantagement. Still attached to these men are those privileges and advantages granted to men and denied to women. Because of this, there will seldom be an absence of qualitative difference in something done to women, relative to the thing done to men. Only by ignoring this context can Hugessen J.A. conclude that men and women are equally burdened by section 56(1)(b)[123] [citations in original deleted].

Making it completely clear that the Court specifically excluded the poverty of women as a group from its conception of the ground sex, Hugessen, J.A. said further:

> [I]t is a shameful truth that far more women in Canada suffer from poverty than men. Legislation which discriminates against the poor would therefore adversely affect more women than men. It could not be said, however, to discriminate on the grounds of sex unless it also drew a distinction against poor men or unless it created a different effect on women than on men.[124]

Again, the Court missed the point that poverty is such a central element of gender that legislation which has the effect of exacerbating women's poverty should be understood as a form of sex discrimination. This does not mean that sex is necessarily the only implicated ground. There can be discrimination on more than one ground. In *Thibaudeau*, for example, the ground family status could also be said to have been implicated by the inclusion/deduction scheme, in that women (and some men) who were custodians of their children were negatively affected by the scheme. It should be possible for decision makers to recognize that a provision may discriminate based on more than one ground. A good example of this may be found in the mandatory retirement case of *Dickason*[125] wherein L'Heureux-Dubé, J., in dissent, recognized that mandatory retirement at age 65 is as much an issue of gender as of age because of socio-economic patterns affecting women.

However, it appears that in *Thibaudeau* nothing short of direct evidence of a biological manifestation of discrimination would have convinced the Federal Court of Appeal that the inclusion/deduction scheme constitutes sex discrimination. This is made evident by the example of physical testing supplied by the Court.[126] Hugessen, J.A. suggested as a counter example to poverty, which he indicated the Court did not recognize as an issue of sex discrimination, that legislation imposing a physical test that could more easily be met by most men would be vulnerable to attack as sex discrimination. Although Hugessen, J.A. suggested that such a test would be "qualitatively different" for women than for men, the only way in which this makes any sense, in the terms of the judgment as a whole, is if we understand that different capacities to succeed in physical tests are elements of sex, such as the capacity for pregnancy and the capacity for prostate cancer.

It is not that Hugessen, J.A. is entirely wrong in his characterization of men and women's biological differences, but rather that the Court was too narrowly focussed on the question of biological similarities and differences and not focussed enough on the societally constructed hierarchy of inequality between men and women.

Whether or not the ground sex works for women is not just an academic point. For adverse effects analysis to function effectively for women, it is critical that decision makers not place all legislation on an artificial gender-neutral footing, and obscure the adverse effects of facially neutral legislation on women by reducing the ground sex to a matter of biological difference alone. The legal ground sex must be understood to include the political, social and economic consequences of being female.

Women's sex equality claims that do not succeed as such are also vulnerable to failing on other grounds, even when, as under the Charter, there is an open-ended list of grounds. In *Thibaudeau,* a majority of the Federal Court of Appeal did find that the challenged provision of the *Income Tax Act* violated the equality rights of the "separated custodial parent" based on the ground family status.[127] However, this conclusion was overturned on appeal to the Supreme Court of Canada which found no discrimination.[128] It is also worthwhile to note that in the Federal Court of Appeal, Letourneau J.A., the only judge who specifically addressed the question of whether the inclusion/deduction system discriminated based on the ground of social condition, found that it did not because in his view there was no evidence that the discrimination created by the *Income Tax Act* was "in any way dictated by the applicant's 'social condition'."[129] In other words, according to Letourneau, J.A., to prove discrimination based on social condition, Suzanne Thibaudeau would have had to show that her social condition, as a divorced single mother receiving child support payments, was the *cause* of the discrimination of which she complained. This adds to our scepticism about whether merely adding the ground social condition to the CHRA would make a difference to the outcome of a case such as this.

There is a pattern in the case law of decision makers requiring that the affected group include no members of any other group—which is another way of analyzing what the Federal Court of Appeal did in *Thibaudeau*—making it difficult, if not impossible, for women to get any assistance in using human rights legislation to address issues of economic inequality, whether those issues arise in the context of services, accommodation or employment.

The following examples related to women's access to employment benefits are illustrative. They also show that the logic on which *Thibaudeau* rests is not confined to Charter jurisprudence. The same logic has infected statutory human rights jurisprudence and, therefore, warrants serious attention in this review of the CHRA.

Saskatchewan Teachers' Superannuation Comm. v. *Anderson*[130] is a case about women and pensions. The complaint concerned a refusal by the Saskatchewan Teachers' Superannuation Commission (STSC) to allow the complainants Sharon Lee Anderson and Signe J. Mossman to buy back contributory service to replace lost entitlement because of pregnancy. Anderson and Mossman were teachers who became pregnant in the 1950s and 1960s. Before 1976, their school boards did not provide maternity leaves and required women to resign when they became pregnant.

Some years later, Anderson and Mossman applied to the STSC to purchase one year's contributory pension benefits. Both women were due to retire with just under 30 years of

service. Their failure to accumulate 30 years of service was due to lost seniority and benefits at the time of their pregnancies. The STSC refused the application because under the governing statute, members were only allowed to purchase contributory service to replace time taken for leaves approved by a school board. However, board-approved leaves did not come into being until 1976. Since neither woman took an approved leave, there being no approved leaves for maternity at the time, they were refused permission to purchase the extra service. They complained that the STSC policy constituted sex discrimination.

Ultimately, their case was heard by the Saskatchewan Court of Appeal. In dissent, Jackson, J.A. found that there was sex discrimination. Applying Supreme Court of Canada doctrine on adverse effect discrimination, Jackson, J.A. ruled that the effect of the policy was to say "no women who took maternity leaves prior to January 1, 1976, are entitled to buy back the leave period for pension purposes."[131] Jackson, J.A. reasoned that the complainants were denied a benefit because they were pregnant and needed to take time off work. This denial had a disproportionate effect on women because the very fact of pregnancy necessitates taking an absence from teaching. They were discriminated against vis-à-vis men who did not have the same physical need. The STSC policy then built on that discrimination by offering the buyback option only to those with approved leaves when the opportunity for women to obtain approval for maternity leave did not exist. Jackson, J.A. concluded that, "[t]heir disadvantage, at its essence, stems from being women."[132]

Although Jackson, J.A. made a finding of sex discrimination, the majority disagreed. The majority reconfigured the comparison that the complainants sought to make between those who needed maternity leave and those who did not, such that the situation was rendered gender neutral and therefore devoid of sex discrimination. In the view of Gerwing, J.A., writing for the majority, the legislation distinguished between parents who took time off to care for their new children before the inception of board-approved leaves in 1976 and all other teachers.[133] Gerwing, J.A. characterized the fact that only women can become pregnant as "beside the point,"[134] and reasoned that "[m]en who took parental leave before Board-approved leaves were instituted have also been denied the option to buy back lost pension benefits."[135] The majority concluded that the legislation really drew a distinction, not based on sex, "but on time; that is when the absence took place in relation to the enactment of the provision to permit pension benefits in situations where there had not been a Board-approved leave."[136]

In *Dumont-Ferlatte* v. *Canada (Employment and Immigration Comm.)*[137] a federal human rights tribunal reasoned similarly that it was not discriminatory to penalize women who were away from work on maternity leave provided that other non-pregnant employees were also subject to penalty for absence. In this case, a sex discrimination complaint was brought in respect of a collective agreement provision that prevented a woman absent from work on maternity leave from earning her annual leave, sick leave credits and other benefits. The rule at issue was that if an employee worked less than 10 days in a calendar month, entitlement to these benefits ceased. On its face, the rule was gender neutral.

It was argued on behalf of the complainant that, although the rule was facially neutral, it discriminated against women by penalizing them for taking maternity leave.[138] However, the Tribunal held that the provision was not discriminatory because it applied to all leaves without pay. Explicitly invoking the reasoning of Hugessen, J.A. in *Thibaudeau*,[139] the Tribunal said: "With all due respect for the opposite view, it is not sufficient here to compare the situation of a pregnant woman with that of a man who will never be pregnant."[140]

The Tribunal went on to say that, based on *Thibaudeau*: " It is therefore necessary also to examine the effects of the rule and ask oneself whether a pregnant woman...is treated any differently than others to whom the same rule applies when they take similar kinds of leave."[141]

The Tribunal concluded that all employees on unpaid leaves were treated the same and therefore there was no discrimination based on sex.

It is ironic that in pregnancy cases such as *Saskatchewan Teachers* and *Dumont-Ferlatte*, even on a strictly biological approach to the ground sex, the decision makers could have found sex discrimination. The fact that they did not, and instead placed pregnant women in a group with other non-pregnant persons, suggests that the message of the Supreme Court of Canada in *Brooks*, to the effect that women should not be penalized because of their childbearing capacity, has not taken hold in the jurisprudence. Moreover, it would be a mistake to think that the obstacle represented by these cases relates only to pregnancy. The underlying problem is a lack of recognition that protections against sex discrimination are intended to remove barriers disproportionately experienced by women as a group.

Notwithstanding extensive talk in the cases about the applicability of adverse effects analysis, too often decision makers are actually still only focussed on the question of whether there is direct discrimination, and they have great difficulty getting beyond that.

Meiorin in the British Columbia Court of Appeal, *Thibaudeau* in the Federal Court of Appeal, *Saskatchewan Teachers* and *Dumont-Ferlatte* are all examples of women's complaints of sex discrimination being individualized and neutralized to the point that the impact on women as a group becomes invisible. The logic underlying these cases is this: as long as there are some men in the group, and everyone in the group is treated as though they were male, it cannot be sex discrimination. Until this formal equality logic is displaced, women will not receive the full benefit and protection of human rights protections.

4. CONCLUSION AND RECOMMENDATIONS

Since its introduction 25 years ago, human rights law has evolved significantly. Among the central jurisprudential developments are the recognition of adverse effect discrimination and the movement away from highly mechanical, individualistic modes of legal reasoning such as that which resulted in the defeat of women's sex equality claims under the *Canadian Bill of Rights*.[142]

Notwithstanding these positive developments, cases show that the mind set some courts and tribunals bring to the task of applying human rights guarantees makes it unlikely they can be effective tools for dismantling entrenched patterns of social and economic disadvantage experienced by women. There is a disturbing tendency for adjudicators to discount discrimination complained of by women unless it is shown that a respondent is treating individual women differently from individual men. And there is resistance to inferring different treatment from evidence of adverse effects experienced by women. The result is that women are being blocked in their efforts to use human rights protections to address conditions of social and economic inequality. Simultaneously, the ability of human rights legislation to meet the needs of women is undermined.

A major objective of this review should be to forge the CHRA into a tool that can more effectively address the material inequality of women. We have considered as one policy option the idea of adding a new ground to the CHRA, a ground called "social condition." Based on the Quebec experience, our assessment is that social condition is likely to be interpreted narrowly, as providing a right to have one's status as a recipient of social assistance, or a person with low income, ignored by employers and service providers. In our view, the addition of social condition, by itself, is an unsatisfactory response to central difficulties women confront in cases where they challenge rules and policies that maintain or reinforce their economic inequality. What is needed is a reframing of the CHRA, a reframing that reflects the transition from formal equality to substantive equality thinking that is occurring in Canadian human rights jurisprudence, and a reframing that both incorporates into the CHRA the positive jurisprudential developments of the last 20 years and seeks to overcome known problems occurring in the application of substantive equality precepts.

In general, the current CHRA is a formal equality document. It is individually focussed and assumes that equality can be achieved if public and private actors refrain from negative conduct and treat individuals the same, with some specified exceptions. In 1999, this vision is both unpersuasive and out of date. It is time for the CHRA to reflect both current knowledge and Canada's international human rights commitments.

Thinking about reframing human rights legislation for a new century is a big project. In the time and space available here, we can only sketch quickly principal elements that need to be dealt with. We make suggestions for new language, in all modesty, not because we believe we have devised *the* way to reconfigure the language of the Act but in the hope that our

attempts will spark discussion among the many women in Canada who care about this most basic equality tool, the CHRA.

There are a number of areas in which constructive changes could be made.

The Right of Women to Substantive Equality

Nowhere is it recognized in the CHRA that the Act is intended to promote the substantive equality of women. Although the Supreme Court of Canada has explicitly recognized that women are a disadvantaged group in Canadian society and that a key purpose of human rights legislation is to eliminate this disadvantage, the current CHRA expresses no acknowledgement that women, as a group, are a central concern of the legislation, no recognition that women are disadvantaged and no normative commitment to women's substantive equality.

Instead, the Act gives an opposite message.

The purpose clause refers to equality of opportunity for individuals and fails to specify an intention to address patterns of inequality experienced by disadvantaged groups. Section 2 states:

> The purpose of this Act is to extend the laws in Canada and to give effect, within the purview of matters coming within the legislative authority of Parliament, to the principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability or conviction for an offence for which a pardon has been granted.

Also, the grounds in the CHRA, such as sex, are worded neutrally. This gives no clue that sex inequality is a persistent problem for women as a group, and rarely a problem for men.

The central prohibitory sections of the CHRA dealing with employment, services, harassment, membership in trade unions and professional associations, reinforce the idea that discrimination is an experience of individuals, without group dimensions. A majority of the sections (ss. 5 through 14) which define discriminatory practices state that it is a discriminatory practice to deny an opportunity *to any individual* or to differentiate adversely in relation *to any individual.*[143]

Reference to a class of individuals appears in s. 10, which states that it is a discriminatory practice for an employer or a union to pursue a policy, or enter into an agreement, that deprives an individual *or class of individuals* of any opportunity because of a prohibited

ground of discrimination. The possibility of a group or class being affected by a discriminatory practice is acknowledged here, but only, we note, with respect to employment. No such provision deals with discrimination against a class of individuals with respect to harassment, a service or tenancy.

Further, there is a problem inherent in s. 10 being a separate section from the general employment section, because this implies that complaints made by individuals about incidents of discrimination under s. 7 have no group dimensions and that one can draw a bright line between individual and class complaints. This is a problematic message; many complaints can only be accurately analyzed when the status and conditions of the group to which the complainant belongs are taken into account. Many individual complaints have implications for a whole group. Every woman's complaint has group dimensions.

Unfortunately, s. 10 does not counteract the overwhelmingly individualistic focus of the Act. Indeed, it seems to reinforce the message that individual treatment is principally what the Act is about.

Judicial endorsement of the idea that anti-discrimination provisions and constitutional equality rights guarantees should address the actual disadvantages of historically disadvantaged groups, such as women, is relatively new, but central to women's advancement. Now the CHRA needs to reflect this fundamental principle. We note that in B.C.'s new *Human Rights Code*, one stated goal of the legislation is: "to identify and eliminate the persistent patterns of inequality associated with discrimination prohibited by this Code."[144]

It is essential that a revised CHRA:

- expressly state that a purpose of the Act is to identify and eliminate political, social and economic disadvantages experienced by historically disadvantaged groups;[145]

- specifically name women as a group that experiences persistent disadvantage; and

- specifically name Aboriginal people, people of colour and persons with disabilities in a non-exclusive list of groups that are historically disadvantaged.

Naming women, Aboriginal people, people of colour and persons with disabilities is crucial to giving the Act a substantive equality focus. It is also essential to include a list of disadvantaged groups to ensure the category "women" is understood to include Aboriginal women, women of colour, women with disabilities and other groups of women.

By recommending that women be named specifically in the CHRA, we should not be understood to be advocating that other disadvantaged groups, in particular, Aboriginal people, people of colour and persons with disabilities should not be named in a similar fashion and for similar reasons. Indeed, we believe they should be. A number of the following recommendations could easily be broadened to name and include other historically

disadvantaged groups. The focus in this paper, however, is on women and women's inequality problems.

In addition to specifically naming women, a revised CHRA should:

- eliminate the separation of individual and class complaints as they are currently separated in ss. 7 and 10;

- ensure that each section dealing with employment or services, etc. recognizes the group dimensions of complaints made by members of disadvantaged groups; and

- ensure that each section dealing with employment or services, etc. prohibits any practice which has the effect of maintaining, reinforcing or exacerbating the disadvantage of an historically disadvantaged group.

Overlapping and Multiple Forms of Discrimination Experienced by Women

In addition to the fact that the grounds are stated neutrally, which gives a distorted picture of the problem that human rights legislation is intended to address, grounds are listed as though each were neatly distinct.

Although the CHRA was amended recently to include a new s. 3.1, clarifying that a discriminatory practice can be based on the effect of a combination of prohibited grounds, it is not clear that this, by itself, will encourage investigators and adjudicators to perceive the particularities of discrimination experienced by, for example, Aboriginal women, black women, women with disabilities, lesbians and single mothers, and dissuade them from rejecting claims that do not fit neatly into just one ground.[146]

This is a hard problem to solve through statutory language. However, it is a fundamental issue because, as we noted earlier, if grounds are not read together, the claims of the most disadvantaged women disappear.

The statement about intersectionality in s. 3.1 is very abstract. A statement that can be readily understood by women who are potential complainants, by investigators and adjudicators is needed.

A revised CHRA should therefore, in our view, specifically state that a purpose of the Act is to address those forms of discrimination that all too easily disappear from view because of the compartmentalization of grounds, that is, the overlapping forms of discrimination experienced by Aboriginal women, women of colour, immigrant women, women with disabilities, lesbians, single mothers and older women.

Adverse Effect Discrimination

The CHRA is mainly silent on the question of adverse effect discrimination. Section 7 prohibits discriminating *directly or indirectly* with respect to employment. This is the only reference and it is not adequate. It is clear from the cases that the concept of adverse effect discrimination applies throughout the Act, and is not restricted to employment. The concept of adverse effect discrimination has developed, and is well established, in the case law.

Nonetheless, as we have noted, there are significant problems outstanding in the application of adverse effects analysis and it is, for women, a crucial matter to their advancement. In this review, we believe it is essential that the Act be amended to confirm the centrality of adverse effects analysis to human rights law and to ward off problems that are identifiable in the case law.

We recommend that the revised Act explicitly state that:

The discrimination which the CHRA is intended to prevent includes the adverse effects experienced by women through the operation of facially neutral rules, policies and practices, which maintain or exacerbate their pre-existing disadvantage.

And further:

It is not a defence to a claim of adverse effect discrimination brought by women to show that:

a) some men are affected negatively by the impugned rule of policy; or

b) the impugned rule or policy is not the sole cause of the inequality complained of.

Affirmative Responses to Discrimination

As we have noted, the general structure of the CHRA posits that compliance with the Act will be achieved if employers, service providers and others refrain from engaging in discriminatory practices. The notion that equality is created by not engaging in discriminatory conduct is a partial truth. Moving toward equality requires taking positive steps to identify and address the various forms of entrenched disadvantage experienced by women, and particular groups of women, in Canada. Refraining from discriminatory conduct that further worsens the situation of women and others is important, but that alone will not alter the status quo of women's inequality.

Section 16(1) of the CHRA does provide for special programs, stating that it is not a discriminatory practice for a person to carry out a special program designed to prevent, reduce or eliminate disadvantages experienced by a disadvantaged group with respect to employment, services or accommodation.

However, the fact that a s. 16(1) program is characterized as "special" reinforces the message that the main goal of the legislation is to ensure that public and private actors do not engage in discriminatory acts. The general rule is: refrain from discriminatory conduct. The exception to the rule is: take positive steps to reduce or eliminate disadvantage. A "special program" can be established voluntarily, in order to go further than the Act generally requires.

This structure, and the relationship of the prohibition sections and the special programs section, conveys the message that the general obligation is a negative one. It is an obligation not to depart from the norm of identical treatment without regard to sex, race or other listed grounds.

Instead, the revised CHRA should endorse the view that everyone to whom the Act applies has a responsibility to take positive steps to promote equality.

The Right of Women to Substantive Equality Includes Full Social and Economic Equality

The CHRA is silent on the question of the social and economic inequality of women. Perhaps the drafters believed that nothing specific need be said. However, the pull of formal equality is still so strong that the meaning of equality can be eviscerated, even after courts have repudiated direct and intentional discrimination as defining, and have embraced the notion that the major focus for human rights and equality rights law must be the elimination of the disadvantage of women and other historically disadvantaged groups. When the concept is eviscerated, it is the guts of the inequality problem that are cast aside, that is, the social and economic inequalities that are key manifestations of entrenched and long-standing discrimination based on sex, race and disability.

There is no question that the commitment of the conceivers of human rights legislation, of federal legislators in 1976 and now, and of Canada as a signatory to international human rights treaties is de facto, not merely de jure equality for women. There is controversy, reflected in the case law, about the relationship of tribunals and courts to governments as allocators of resources. We note, however, that the ICESCR Committee has stated, in its general comment on the domestic application of treaty rights, that the ICESCR's guarantees of equality between women and men, and of non-discrimination with respect to economic, social and cultural rights are rights capable of immediate implementation and of judicial treatment.

Further, the ICESCR Committee has specifically repudiated an approach to human rights which presumes that social and economic rights are not enforceable and, specifically, that social and economic rights dimensions of equality are not enforceable. The Committee has stated:

> [I]n relation to civil and political rights, it is generally taken for granted that judicial remedies for violations are essential. Regrettably, the contrary presumption is too often made in relation to economic, social and cultural

> rights. This discrepancy is not warranted either by the nature of the rights or by the relevant Covenant provisions. The Committee has already made clear that it considers many of the provisions in the Covenant to be capable of immediate implementation.
>
> Thus in General Comment No. 3 [the Committee] cited, by way of example: articles 3 [equality between men and women], [and] 7(a)(i) [equal pay for work of equal value].... [T]here is no Covenant right which could not, in the great majority of systems, be considered to possess at least some significant justifiable dimensions.It is sometimes suggested that matters involving the allocation of resources should be left to the political authorities rather than the courts. While the respective competences of the different branches of government must be respected, it is appropriate to acknowledge that courts are generally already involved in a considerable range of matters which have important resource implications. The adoption of a rigid classification of economic, social and cultural rights which puts them, by definition, beyond the reach of the courts would thus be arbitrary and incompatible with the principle that the two sets of human rights[147] are indivisible and interdependent. It would also drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society.[148]

The Committee concluded General Comment No. 9 by saying: "Guarantees of equality and non-discrimination should be interpreted, to the greatest extent possible, in ways which facilitate the full protection of economic, social and cultural rights."[149]

The CHRA must be able to play a key role in ensuring that economic benefits and opportunities are distributed in the society in a way that redresses the long-standing social and economic disadvantage of women, Aboriginal peoples, people of colour and people with disabilities. It is essential for Parliament to make its intention in this connection explicit in the CHRA.

The Ground Social Condition

Were these recommendations to be implemented, it is our view that social condition could be added as a ground, without fear of it playing a negative role, by diminishing the understanding of the Act's intention and capacity to provide a forum for challenging policies and practices which maintain the poverty and economic inequality that result from entrenched and historical discrimination based on sex, race and disability.

It must be clear that those who are disadvantaged economically and socially are the intended beneficiaries of this ground.

Summary of Recommendations

A revised CHRA should:

- specifically name women;
- specifically name women as a group that experiences persistent disadvantage;
- expressly state that a purpose of the Act is to identify and eliminate political, legal, economic and social disadvantages experienced by women;
- eliminate the separation of individual and class complaints as they are currently separated in ss. 7 and 10;
- ensure that each section dealing with employment or services, etc. recognizes the group dimensions of complaints made by members of disadvantaged groups;
- ensure that each section dealing with employment or services prohibits any practice which has the effect of maintaining, reinforcing or exacerbating the disadvantage of an historically disadvantaged group;
- specifically state that a purpose of the Act is to address those forms of discrimination that all too easily disappear from view because of the compartmentalization of grounds, that is, the overlapping forms of discrimination experienced by groups such as Aboriginal women, women of colour, women with disabilities, lesbians, single mothers and older women;
- specifically state that:
  - the discrimination the CHRA is intended to prevent includes the adverse effects experienced by women through the operation of facially neutral rules, policies and practices which maintain or exacerbate their pre-existing disadvantage,
  - it is not a defence to a claim of adverse effect discrimination brought by women to show that:
    - some men are affected negatively by the impugned rule or policy, or
    - the impugned rule or policy is not the sole cause of the inequality complained of;
- endorse the view that everyone to whom the Act applies has a responsibility to take positive steps to promote equality;
- state explicitly that a purpose of the CHRA is to ensure that economic benefits and opportunities are distributed in the society in a way that redresses the long-standing social and economic disadvantage of women, Aboriginal peoples, people of colour and people with disabilities; and
- if the previous recommendations are implemented, add the ground social condition and ensure those who are economically and socially disadvantaged will be the beneficiaries of this protection.

BIBLIOGRAPHY

Articles and Papers

Armstrong, Pat. 1997. "Restructuring Public and Private: Women's Paid and Unpaid Work." In *Challenging the Public/Private Divide: Feminism, Law, and Public Policy.* Edited by Susan B. Boyd. Toronto: University of Toronto Press.

Day, Shelagh and Gwen Brodsky. 1996. "The Duty to Accommodate: Who Will Benefit?" *Canadian Bar Review.* 75: 433.

Iyer, Nitya. 1993. "Disappearing Women: Racial Minority Women in Human Rights Cases." *Canadian Journal of Women and the Law.* 6: 25.

———. 1996. "Charter Litigating for Race Equality." A paper prepared for the Court Challenges Program, February 1.

Mossman, Mary Jane. 1998. "Achieving Gender Equality." *Kobe University Law Review.* 32: 21.

Philips, Lisa and Margot Young. 1995. "Sex, Tax, and the *Charter*: A Review of *Thibaudeau* v. *Canada.*" *Review of Constitutional Studies.* 2: 221.

Porter, Bruce. 1998. "Beyond *Andrews:* Substantive Equality and Positive Obligations After *Eldridge* and *Vriend.*" *Constitutional Forum Constitutionnel.* 8: 59.

Townson, Monica. 1996. "Non-Standard Work: The Implications for Pension Policy and Retirement Readiness." Unpublished paper prepared for Women's Bureau, Human Resources Development Canada.

Bills and Legislation

Bill C-31, *An Act to amend the Indian Act,* S.C. 1985, c. 27.

Bill C-98, *An Act to amend the Canada Evidence Act and the Criminal Code in respect of persons with disabilities, to amend the Canadian Human Rights Act in respect of persons with disabilities and other matters and to make consequential amendments to other Acts,* 2nd Sess., 35th Parl., 1997.

Bill S-11, *An Act to amend the Canadian Human Rights Act in order to add social condition as a prohibited ground of discrimination,* 1st Sess., 36th Parl., 1997-98.

British Columbia Human Rights Code, R.S.B.C. 1996, c. 210.

Budget Implementation Act, 1995, S.C. 1995, c. 17.

Canada Assistance Plan Act, R.S.C. 1985, c. C-1.

Canada Human Rights Act, R.S.C. 1985, c. H-6.

Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11.

Charter of Human Rights and Freedom, R.S.Q. 1977, c. C-12.

Federal-Provincial Fiscal Arrangements Act, R.S.C. 1985, c. F-8.

Indian Act, S.C. 1951, c. 29.

Indian Act, R.S.C. 1985, c. I-5.

Individual's Rights Protection Act, R.S.A. 1980, c. I-2.

Residential Tenancies Act, R.S.N.S. 1989, c. 401.

Cases

Andrews v. *Law Society (British Columbia),* [1989] 1 S.C.R. 143.

Blake v. *Ontario (Ministry of Correctional Services)* (1984), 5 C.H.R.R. D/2417 (Ont. Bd. Inq.).

Bliss v. *Canada (A.G.)*, [1979] 1 S.C.R. 183.

British Columbia (Public Service Employee Relations Comm.) v. *B.C.G.E.U.* (1997), 30 C.H.R.R. D/83 (B.C.C.A.) leave to appeal to the Supreme Court of Canada granted [1997] S.C.C.A. 541 (QL), appeal heard February 22, 1999 (S.C.C. File No. 26274).

Brooks v. *Canada Safeway Ltd.* (1989), 10 C.H.R.R. D/6183 (S.C.C.).

Canada (Attorney General) v. *Mossop,* [1993] 1 S.C.R. 554.

Canadian National Railway Co. v. *Canada (Human Rights Commission)* (1987), 8 C.H.R.R. D/4210 (S.C.C.).

Canadian Odeon Theatres v. *Huck* (1986), 6 C.H.R.R. D/2682 (Sask. C.A.).

Corbière v. *Canada (Minister of Indian and Northern Affairs)* (1999), 173 D.L.R. (4th) 1 (S.C.C.).

D'Aoust v. *Vallières* (1993), 19 C.H.R.R. D/322 (Que. Trib).

Dartmouth/Halifax County Regional Housing Authority v. *Sparks* (1993), 119 N.S.R. (2d) 91. (C.A.).

Dickason v. *University of Alberta*, [1992] 2 S.C.R. 1103.

Dumont-Ferlatte v. *Canada (Employment and Immigration Comm.)* (1996), 27 C.H.R.R. D/365 (Can. Trib.).

Eldridge v. *British Columbia (Attorney General),* [1997] 3 S.C.R. 624.

Janzen v. *Platy Enterprises Ltd.* (1989), 10 C.H.R.R. D/6205 (S.C.C.).

Johnson v. *Québec (Comm. des affaires sociales)*, [1984] C.A. 61 (Que Trib.).

Lambert v. *Québec (Ministère du tourisme) (No. 3)* (1997), 29 C.H.R.R. D/246 (Que. Trib.).

Lauzone v. *Le centre hospitalier St-Vincent de Paul de Sherbrooke*, (September 7, 1978) C.S. St-François 450-05-000856-78 (Que. Trib).

Law v. *Canada (Minister of Employment and Immigration),* [1999] S.C.R. 497.

Lévesque v. *Québec (A.G.)*, [1988] R.J.Q. 223 (Que. C.A.).

McKinney v. *University of Guelph,* [1990] 3 S.C.R. 229.

Re British Columbia (Public Service Employee Relations Commission) and B.C.G.E.U. (Meiorin) (1996), 58 L.A.C. (4th) 159 (B.C.L.R.B.).

Mercier v. *Beauport (Ville)* (1981), 3 C.H.R.R. D/648 (Que. P.C.).

Ontario (Human Rights Commission) and O'Malley v. *Simpsons Sears*, [1985] 2 S.C.R. 536.

Québec (Comm. des droits de la personne) v. *Briand* (6 May 1997), Québec 200-53-000003-967, (Que. Trib.).

Québec (Comm. des droits de la personne) v. *J.M. Brouillette Inc.* (1994), 23 C.H.R.R. D/495 (Que. Trib.).

Québec (Comm. des droits de la personne) v. *Clinique Dentaire Forcier* (27 October 1998) Drummond 405-53-000001-982 (Que. Trib).

Québec (Comm. des droits de la personne) v. *Gauthier* (1993), 19 C.H.R.R. D/312 (Que. Trib.).

Québec (Comm. des droits de la personne) v. *Ianiro* (1996), 29 C.H.R.R. D/79 (Que.Trib.).

Québec (Comm. des droits de la personne) v. *O'Hashi* (1996), 31 C.H.R.R. D/474 (Que. Trib.).

Québec (Comm. des droits de la personne) v. *Tremblay* (13 April 1999), Québec 200-53-000014-998 (Que. Trib.).

Québec (Comm. des droits de la personne) v. *Montréal (Ville)* (1982), 4 C.H.R.R. D/1444 (Que. S.C.).

Québec (Comm. des droits de la personne) v. *Whittom* (1993), 20 C.H.R.R. D/349 (Que. Trib.).

Saskatchewan Teachers' Superannuation Comm. v. *Anderson* (1995), 24 C.H.R.R. D/177 (Sask. C.A.).

Symes v. *Canada,* [1993] 4 S.C.R. 695.

Thibaudeau v. *Canada* (1994), 114 D.L.R. (4th) 261 (F.C.A.).

Thibaudeau v. *Canada*, [1995] 2 S.C.R. 627.

Vaillancourt v. *Stromei* (18 June 1991) Montreal 500-04-000378-910 (Que. S.C.).

Veronneau v. *Bessette*, C.P. 750-32-001640-78, 1979.

Vriend v. *Alberta (A.G.),* [1998] 1 S.C.R. 493.

Weatherall v. *Canada (Attorney General),* [1993] 2 S.C.R. 872.

Whittom v. *Québec (Comm. des droits de la personne*) (1997), 29 C.H.R.R. D/1 (Que. C.A.).

Hansard

Canada. Debates of the Senate, First Reading of Bill S-11, Vol. 137, Issue 29, 1st Sess., 36th Parl., (December 10, 1997).

———. Second Reading of Bill S-11, 1st Sess., 36th Parl., (February 17, 1998).

Canada. Senate. Standing Committee on Legal and Constitutional Affairs. *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, 1st Sess., 36th Parl., (May 7, 1998).

———. *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, 1st Sess., 36th Parl., (May 27, 1998).

———. *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, 1st Sess., 36th Parl., (June 4, 1998).

International Documents

Convention on the Elimination of All Forms of Discrimination Against Women, GA Res. 34/180, UN GAOR, 34th Sess., (Supp. No. 46), UN Doc. A/34/46 (1982), Can. T.S. 1982 No. 31.

International Covenant on Civil and Political Rights, GA Res. 2200A (XXI), 21 UN GAOR, (Supp. No. 16) 52, UN Doc. A/6316 (1966), 999 U.N.T.S. 171, Can. T.S. 1976
No. 47.

International Covenant on Economic, Social and Cultural Rights, GA Res. 2200A (XXI), 21 UN GAOR, (Supp. No. 16), UN Doc. A/6316 (1966), 993 U.N.T.S. 3, Can. T.S.1976 No. 46.

UN Committee on Economic, Social and Cultural Rights, *General Comment No. 9, The Domestic Application of the Covenant*, E/C.12/1998/24 (December 3, 1998).

UN Committee on Economic, Social and Cultural Rights, *Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant (Concluding Observations - Canada)* 19th Sess., 57th Mtg. UN Doc. E/C.12/1/Add 31 (December 4, 1998).

Statement by Ambassador Mark. J. Moher, Head of the Delegation of Canada before the UN Committee on Economic, Social and Cultural Rights (November 26-27, 1998).

Books, Reports and Facta

Brodsky, Gwen. 1999. "The Transformation of Canadian Equality Rights Law." Unpublished doctoral dissertation, York University, May.

Cohen, Erminie and Angela Petten. 1997. *Sounding the Alarm: Poverty in Canada* Ottawa.

Day, Shelagh. Forthcoming. "Canada's Human Rights System: Thirty Years Later." In the proceedings of the Conference on Equal Opportunity Law in International and Comparative Perspective, Hong Kong, 1998.

Day, Shelagh and Gwen Brodsky. 1998. *Women and the Equality Deficit: The Impact of Restructuring Canada's Social Programs.* Ottawa: Status of Women Canada.

Factum of Women's Legal Education and Action Fund (LEAF) filed in the appeal to the Supreme Court of Canada in the case of *British Columbia (Public Service Employee Relations Comm.)* v. *B.C.G.E.U.* (1997), 30 C.H.R.R. D/83 (B.C.C.A.).

National Association of Women and the Law, *Canadian Women and the Social Deficit: A Presentation to the International Committee on Economic, Social and Cultural Rights, on the Occasion of the Consideration of Canada's Third Report on the Implementation of the International Covenant on Economic, Social and Cultural Rights, Geneva, November 16, 1998.*

National Association of Women and the Law, *Supplement to: The Civil and Political Rights of Women, Submission to the United Nations Human Rights Committee on the Occasion of the Consideration of Canada's Fourth Report on the Implementation of the International Covenant on Civil and Political Rights, New York, March 26, 1999.*

National Council of Welfare. 1997. *Poverty Profile 1995: A Report by the National Council of Welfare.* Ottawa: Supply and Services Canada.

Report of the Royal Commission on the Status of Women in Canada. 1970. Ottawa: Information Canada.

Status of Women Canada. 1995. *Setting the Stage for the Next Century: The Federal Plan for Gender Equality.* Ottawa: Status of Women Canada.

Women in Canada: A Statistical Report, 3 ed. 1995. Ottawa: Industry Canada.

ENDNOTES

[1] *Canada Human Rights Act*, R.S.C. 1985, c. H-6.

[2] *Report of the Royal Commission on the Status of Women in Canada* (Ottawa: Information Canada, 1970) at 388.

[3] *Ibid.* at 389.

[4] *Ibid.* at 387. The Royal Commission said: "Moreover there is a need to keep a continuing watch to ensure that women's rights and freedoms are protected." The Commission proposed that human rights commissions and human rights laws be established to "ensure that no discrimination occurs in fact, or in the interpretation of the law."

[5] See *Janzen* v. *Platy Enterprises Ltd.* (1989), 10 C.H.R.R. D/6205 (S.C.C.).

[6] See Pat Armstrong. 1997. "Restructuring Public and Private: Women's Paid and Unpaid Work." In *Challenging the Public/Private Divide: Feminism, Law, and Public Policy.* Edited by Susan B. Boyd. Toronto: University of Toronto Press, 37.

[7] *Supra* note 2 at 312.

[8] *Women in Canada: A Statistical Report.* 3 ed. 1995. Ottawa: Industry Canada, at 84.

[9] *Supra* note 2 at 319.

[10] National Council of Welfare. 1997. *Poverty Profile 1995: A Report by the National Council of Welfare.* Ottawa: Supply and Services Canada, at 85.

[11] *Supra* note 2 at 319.

[12] *Supra* note 10 at 85.

[13] The assumption that women work part time because they want to bears re-examination. In 1994, 34 percent of all female part-time workers indicated they wanted full-time employment but could not find it. See *Women in Canada, supra* note 8 at 66.

[14] Monica Townson. 1996. "Non-Standard Work: The Implications for Pension Policy and Retirement Readiness." Unpublished paper prepared for Women's Bureau, Human Resources Development Canada.

[15] See Shelagh Day and Gwen Brodsky. 1998. *Women and the Equality Deficit: The Impact of Restructuring Social Programs in Canada.* Ottawa: Status of Women Canada, at 7.

[16] Status of Women Canada. 1995. *Setting the Stage for the Next Century: The Federal Plan for Gender Equality.* Ottawa: Status of Women Canada.

[17] R.S.C. 1985, c. C-1. The *Canada Assistance Plan Act* is repealed by the *Budget Implementation Act, 1995,* S.C. 1995, c. 17.

[18] The Canada Health and Social Transfer was established by means of an amendment to the *Federal-Provincial Fiscal Arrangements Act,* R.S.C. 1985, c. F-8.

[19] For a full discussion of the impact on women of the 1995 *Budget Implementation Act*, including the repeal of the Canada Assistance Plan and the establishment of the new Canada Health and Social Transfer, see Shelagh Day and Gwen Brodsky, *Women and the Equality Deficit, supra* note 15.

[20] See National Association of Women and the Law, *Supplement to: The Civil and Political Rights of Women, Submission to the United Nations Human Rights Committee on the Occasion of the Consideration of Canada's Fourth Report on the Implementation of the International Covenant on Civil and Political Rights, New York, March 26, 1999*. NAWL's submission to the Human Rights Committee noted that:

> [I]n January 1997, the federal government introduced new unemployment insurance legislation, the *Employment Insurance Act*. One of the most significant changes in the legislation was the switch from eligibility based on weeks worked to eligibility based on hours worked. Under the old scheme, an individual needed 12 - 20 weeks (depending upon where that individual lived) of insurable earnings within the qualifying period to qualify for full benefits (including maternity benefits). A week of insurable earnings was a week in which at least 15 hours were worked (or a week in which the claimant had earned at least 20 percent of the maximum weekly insurable earnings). A claimant now needs a minimum of 700 hours of insurable earnings within the qualifying period. This is equivalent to twenty 35-hour weeks or approximately 46.6 15-hour weeks. For most individuals who work less than 35 hours a week, eligibility requirements are significantly more stringent than before. Indeed, the more part-time an individual's work is, the longer it will take for that worker to meet eligibility requirements. Whereas, previously, individuals working between 15 and 34 hours per week qualified for benefits after twenty weeks, these same individuals must now work between 20.5 and 46.6 weeks in order to accumulate the required 700 hours. The only positive side to this change is that individuals working less than 15 hours a week are no longer formally disentitled from benefits, as there is now no formal part-time cut-off. However, anyone working less than 14 hours a week cannot accumulate the required number of hours because it must be done within the qualifying period of 52 weeks. The 1996 legislation has also erected obstacles for people who have been out of the labour force for a long stretch of time. The new rules stipulate that such individuals need 910 hours of paid employment (the equivalent of 26 weeks of full-time work or a much longer period of part-time work) to qualify for benefits. These changes in eligibility requirements have hit working women disproportionately hard. Women, more than men, work in those temporary, part-time, seasonal, and/or unstable work situations—the secondary labour sector—where meeting these eligibility requirements is most difficult. They are also those employees especially vulnerable to work reduction and lay-offs. Additionally, the

increased qualifying hours mandated for people returning to the labour force after a long absence from it disproportionately impact women. Women are excluded from benefits they would have had under the previous legislation because of time off to raise children. Women's child rearing and caregiving responsibilities often result in precisely the kind of workforce absences and working patterns penalized under these rules. Recent government statistics, released March 18, 1999 by the federal Department of Human Resources Development, document this discrimination, confirming the legislation's negative gender-specific impact on women. The Report shows that the number of women who successfully claim unemployment insurance benefits has gone down by 20 percent while the number of men has been reduced by only 16 percent. A Canadian Labour Congress study of Statistics Canada data shows that only 31 percent of unemployed women got unemployment insurance benefits in 1997. Only 11 percent of women under 25 are receiving unemployment insurance benefits compared to 18 percent of men. Part-time female workers continue to pay premiums but, the data show, are disproportionately not able to claim unemployment benefits.

Maternity benefits are administered under the Employment Insurance Act and thus are also subject to these same rule changes. The result is that 12,000 fewer women qualified for maternity benefits in 1997, the year these changes took effect, than in 1996, when the old legislation was still in place. While no data exists to relate such statistics about maternity benefit qualification to changes in the birthrate, a Canadian Labour Congress senior economist has stated that the numbers of women affected is, even after the birthrate is factored in, likely still to be substantial.

Aboriginal women, women of colour, immigrant women, and women with disabilities are overrepresented in the "marginal" labour force. Thus, changes to unemployment insurance—as they affect both unemployment insurance benefits and maternity benefits—have exacerbated inequities already present in these women's involvement in the paid labour force.

Meanwhile, it is forecast that the Employment Insurance Account will have an accumulated surplus of $20 billion by the end of 1998. These factors have placed a huge strain on provincial social assistance programs since individuals unable to collect unemployment insurance are forced to rely on provincial income assistance programs. These provincial programs are significantly less generous in benefit level and more stigmatizing of recipients than unemployment insurance.

[21] UN Committee on Economic, Social and Cultural Rights, *Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant (Concluding Observations - Canada)* 19th Sess., 57th Mtg., UN Doc. E/C.12/1/Add 31 (December 4, 1998) [hereinafter *Concluding Observations*] at para. 11.

[22] See *Convention on the Elimination of All Forms of Discrimination Against Women,* GA Res. 34/180, UN GAOR, 34th Sess., (Supp. No. 46), UN Doc. A/34/46 (1982), Can. T.S. 1982 No. 31 [hereinafter *CEDAW*], Article 3.

[23] See *International Covenant on Economic, Social and Cultural Rights*, GA Res. 2200A (XXI), 21 UN GAOR, (Supp. No. 16), UN Doc. A/6316 (1966), 993 U.N.T.S. 3, Can T.S. 1976 No. 46 [hereinafter *ICESCR*], Article 2(1).

[24] *Statement by Ambassador Mark. J. Moher, Head of the Delegation of Canada before the UN Committee on Economic, Social and Cultural Rights (26-27 November 1998).*

[25] See National Association of Women and the Law, *Canadian Women and the Social Deficit: A Presentation to the International Committee on Economic, Social and Cultural Rights, on the Occasion of the Consideration of Canada's Third Report on the Implementation of the International Covenant on Economic, Social and Cultural Rights, Geneva, November 16, 1998.* See also, *National Association of Women and the Law, supra* note 20.

[26] *Concluding Observations, supra* note 21 para. 51.

[27] *Concluding Observations, ibid.* para. 53.

[28] See Shelagh Day. Forthcoming. "Canada's Human Rights System: Thirty Years Later." In the proceedings of the Conference on Equal Opportunity Law in International and Comparative Perspective, Hong Kong, 1998.

[29] Bill S-11, *An Act to amend the Canadian Human Rights Act in order to add social condition as a prohibited ground of discrimination,* 1st Sess., 36th Parl., 1997-98.

[30] *Charter of Human Rights and Freedom*, R.S.Q. 1977, c. C-12.

[31] *Supra* note 29.

[32] Bill C-98, *An Act to amend the Canada Evidence Act and the Criminal Code in respect of persons with disabilities, to amend the Canadian Human Rights Act in respect of persons with disabilities and other matters and to make consequential amendments to other Acts*, 2nd Sess., 35th Parl., 1997.

[33] Erminie Cohen and Angela Petten. 1997. *Sounding the Alarm: Poverty in Canada.* Ottawa.

[34] *Ibid.* at xiii.

[35] *Ibid.*

[36] The Honourable Erminie J. Cohen, Canada. Debates of the Senate, Second Reading of Bill S-11, 1st Sess., 36th Parl., (February 17, 1998).

[37] Michelle Fardeau-Ramsay, Q.C., Chief Commissioner, Canadian Human Rights Commission, Canada. Senate. Standing Committee on Legal and Constitutional Affairs, *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, 1st Sess., 36th Parl., (May 27, 1998).

[38] Fred Robertson, Board Member, National Anti-Poverty Organization, Canada. Senate. Standing Committee on Legal and Constitutional Affairs. *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, 1st Sess., 36th Parl., (May 27, 1998).

[39] See Martha Jackman, Professor of Law, Canada. Senate. Standing Committee on Legal and Constitutional Affairs. *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, 1st Sess., 36th Parl., (May 7, 1998).

[40] Senator Grafstein, Canada. Senate. Standing Committee on Legal and Constitutional Affairs. *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, 1st Sess., 36th Parl., (June 4, 1998).

[41] (1996), 29 C.H.R.R. D/79 (Que. Trib.).

[42] See also *Veronneau* v. *Bessette*, C.P. 750-32-001640-78, 1979 (Que. Trib.). In this case it was held that a women who was divorcee and a welfare recipient had been refused accommodation, based on her civil status as a divorced woman and on her "social condition" as a welfare recipient, contrary to the Quebec Charter.

[43] (1993), 20 C.H.R.R. D/349 (Que. Trib.).

[44] *Ibid.* at D/356.

[45] *Ibid.* at D/355.

[46] *Whittom* v. *Québec (Comm. des droits de la personne)* (1997), 29 C.H.R.R. D/1 (Que. C.A.).

[47] *Supra* note 43 at D/355.

[48] A tribunal held that Patrick Larente had been discriminated against on the basis of "social condition" (*Québec (Comm. des droits de la personne)* v. *Gauthier* (1993), 19 C.H.R.R. D/312 (Que. Trib.)). At issue was the respondent's acknowledged policy of denying accommodation to all welfare recipients irrespective of their ability to pay monthly rent.

In the *Gauthier* decision the Tribunal notes that expert evidence showed that as a welfare recipient the complainant's annual income was well below the poverty level established by Statistics Canada; in a society where people are judged on the basis of their employment welfare recipients are frequently set apart because they are not employed; and as a group welfare recipients have less education than the general population.

The Tribunal held that Isabelle Leroux was discriminated against because of her social condition when she was refused the rental of a new suite (*Québec (Comm. des droits de la personne)* v. *J.M. Brouillette Inc.* (1994), 23 C.H.R.R. D/495 (Que. Trib.). The Tribunal found as fact that the respondent refused to rent the new suite to the complainant because she was receiving social assistance, and not for purely economic reasons as the owner argued. The complainant was a 19-year old woman, receiving social assistance, jobless and the head of a single-parent family.

Regard may also be had to *Québec (Comm. des droits de la personne)* v. *Briand* (May 6, 1997), Quebec 200-53-000003-967, (Que Trib.). In 1996, Ms. Guay was a welfare recipient and a single mother with two young children. The family lived in a rented apartment. She was not employed, but was planning to go back to school and wanted, therefore, to move into a bigger apartment. She found an affordable apartment and went to look at it. She told the owner, Mr. Briand, that she was interested in the apartment, but that she wanted to find out about the local school and Hydro-Québec fees.

She revisited the apartment with a friend. After the visit, she informed the owner that she wanted to rent the apartment. She gave the owner requested information and made it clear to him that she had children, that she was getting ready to return to school, that she was unemployed and that she was a welfare recipient. The owner wanted to talk with both the manager of her building and the owner, but was not given the name of the owner by the building office when he called.

The next day the owner called Ms. Guay and told her that he wouldn't rent her the apartment. He feared that she didn't have the means to pay the rent, which, according to his calculations was "more than 50% of her income." Ms. Guay argued that the rent was only $50 more than for her present apartment and suggested that he should call her building manager to confirm that she always paid her rent. When she checked with the manager, Mr. Briand had not been in contact.

Later the owner offered her another apartment, smaller and with lower rent, which she wasn't interested in. He then suggested that he may rent her the original apartment if she provided him with a co-signer. However, Ms. Guay was concerned that her social welfare could be jeopardized if it looked as if she was living with another person.

The owner contended that the refusal was solely based on financial considerations and that Ms. Guay was offered the apartment with a co-signer but had refused. The Tribunal found that the refusal by Mr. Briand to rent the apartment to Ms. Guay was based at least partly on her social condition, contrary to the Quebec Charter.

And another recent tenancy case involved an allegation of discrimination by landlord against a woman who was unemployed with her second child and her spouse who was in receipt of unemployment insurance *Québec (Comm. des droits de la personne)* v. *Tremblay* (13 April 1999), Québec 200-53-000014-998 (Que. Trib.). The complaint was unsuccessful only because the tribunal found that the allegations had not been proven.

[49] (1997), 29 C.H.R.R. D/246 (Que. Trib).

[50] Interestingly, this case was not taken forward by the Quebec Human Rights Commission, but rather the complainant decided to proceed with the case even though the Commission had decided not to do so. This information was received from Commission counsel Beatrice Vizkelety, telephone conversation August 4, 1999. The Commission intends to intervene in the appeal in support of Mr. Lambert.

[51] *D'Aoust* v. *Vallières* (1993), 19 C.H.R.R. D/322 (Que. Trib).

[52] There have also been a number of cases in which complainants have been unsuccessful in persuading decision makers that they have experienced social condition discrimination. Some cases have failed because the decision maker was not satisfied by the evidence adduced in support of the complainant's allegations. Others have failed because the decision maker was not satisfied that the allegations amounted to discrimination based on the ground social condition. Some examples will suffice.

Tribunals and courts have held that a refusal to hire a person because of his or her criminal record does not fall within the meaning of the ground social condition. (*Mercier* v. *Beauport (Ville)* (1982), 3 C.H.R.R. D/648 (Que. P.C.); *Québec (Comm. des droits de la personne)* v. *Montréal (Ville)* (1982), 4 C.H.R.R. D/1444 (Que. S.C.).

A tribunal dismissed a complaint of harassment brought by Joan Skelly, a nurse, against David O'Hashi, a doctor whom she assisted along with other doctors in a hospital (*Québec (Comm. des droits de la personne)* v. *O'Hashi* (1996), 31 C.H.R.R. D/474 (Que. Trib.)). The tribunal found that the complainant and the respondent, two professionals working in the health care field, had substantially the same social condition and, therefore, that it was not possible to conclude that the complainant suffered harassment as a result of her social condition.

In another case, Denyse Lévesque alleged social condition discrimination because she was denied welfare while she was enrolled in school. (*Lévesque* v. *Québec (A.G.),* [1988] R.J.Q. 223 (Que. C.A.)). Her appeal was rejected by the Superior Court and by the Court of Appeal. Ms. Lévesque was considered a single person under Article 7 of the Social Welfare Law which states that a single person, who attends an educational institution full time, is not eligible for welfare, unless she finds herself in a situation, which is dangerous to her health or there is a risk of complete destitution. The Court of Appeal reasoned that although being student may in certain circumstances be considered as a "social condition" under s. 10 of the Quebec Charter, in the context of s. 7 of the Social Welfare Law, being a full time student at college or university level is not a social condition.

In the case of *Québec (Comm. des droits de la personne)* v. *Clinique Dentaire Forcier* (October 27, 1998) Drummond 405-53-000001-983 (Que. Trib.), Jeannine Guittard complained that her dentist had discriminated against her when he refused her request for dental services, referring her to the hospital for dental services instead, and made prejudicial statements about welfare recipients having bad mouth hygiene and missing their appointments. The tribunal found that the refusal of service was based on the best interest of the patient and her health, not her social condition. The tribunal found further that the comments about welfare recipients, while offensive to Ms. Guittard, did not constitute discrimination based on social condition because they were not directed toward her, but rather concerned other of the dentist's patients. The analysis in this decision, if it were adopted more widely would restrict the use of the ground social condition to challenge poor-bashing, requiring as it does that the prejudicial statements about welfare recipients must be specifically directed to the individual complainant.

The Quebec Charter includes an express right to a fair hearing in legal matters in Article 23. However, family law matters are usually heard in camera and publication of the findings is not permitted, subject to the discretion of the court. In the family law case of *Vaillancourt* v. *Stromei* (June 18, 1991) Montréal 500-04-000378-910 (Que. S.C.), Marie-Josée Stromei, whose husband was a judge,

was concerned that her husband's colleagues would hear the case and without a public hearing she would not receive a fair hearing. Referring inter alia to Article 10 of the Quebec Charter, Ms. Stromei sought a declaration that where one of the parties is a Supreme Court judge, the process should be made public and publication should be allowed. The application was refused. The Court reasoned that acceding to the complainant's request based solely on the fact that her husband is a judge would amount to depriving a class of citizens of the benefit of in camera hearings and would completely go against the principles in Article 10 of the Charter including the right to be treated equally based on civil status and social condition. The analysis in this case gives one pause because the logic of it is that it is discriminatory to treat a person, in this case a judge, differently because of his privileged social position.

[53] This observation is based on information provided by a representative of Action Travail des Femmes, a Montreal women's organization, regarding the experiences of women they assist.

[54] In *Comm. des droits de la personne* v. *Le centre hospitalier St-Vincent de Paul de Sherbrooke,* (7 September 1978) C.S. St-François 450-05-000856-78 (Que. Trib.), cited in *Johnson* v. *Québec (Comm. des affaires sociales)*, [1984] C.A. 61 at 69; and cited by the Tribunal in *Whittom*, *supra* note 43 at D/353.

[55] *Supra* note 48.

[56] *Ibid.* at D/318 and cited by the Tribunal in *Whittom*, *supra* note 43 at D/353.

[57] Quotation and decisions cited by the Tribunal in *Whittom*, *ibid.* at D/354.

[58] *Supra* note 48.

[59] *Ibid.* at 8.

[60] See *Québec (Comm. des droits de la personne)* v. *O'Hashi* and *Vaillancourt* v. *Stromei, supra* note 52.

[61] This analysis of the elements of formal and substantive equality was developed by Gwen Brodsky in "The Transformation of Canadian Equality Rights Law." Unpublished doctoral dissertation, York University, May 1999 at 107-108 and 129-130.

[62] *Canadian National Railway Co.* v. *Canada (Human Rights Commission)* (1987), 8 C.H.R.R. D/4210 (S.C.C.); *Brooks* v. *Canada Safeway Ltd.* (1989), 10 C.H.R.R. D/6183 (S.C.C.) and *Janzen, supra* note 5. These cases do not all involve complaints filed under the CHRA. However, the principles we discuss here have been applied in the interpretation of all Canadian human rights laws.

[63] *Ibid.*

[64] *Ibid.* at D/4211.

[65] *Ibid.*

[66] *Ibid.* at D/4229, para. 33253.

[67] This was the percentage of women in the labour force in the St. Lawrence region who were working in blue-collar jobs at the time.

[68] *Supra* note 5.

[69] *Ibid.* at D/6227, para. 44452.

[70] *Ibid.* at D/6227, para. 44451.

[71] *Ibid.* at D/6228, para. 44452.

[72] *Ibid.* at D/6232, para. 44460.

[73] *Supra* note 62.

[74] *Ibid.* at D/6195-6.

[75] *Weatherall* v. *Canada (Attorney General),* [1993] 2 S.C.R. 872.

[76] *Ibid.* at 877.

[77] An example of this is *Canada (Attorney General)* v. *Mossop,* [1993] 1 S.C.R. 554. In this case, a majority of the Supreme Court of Canada dealt with the grounds sexual orientation and family status as though they were watertight compartments. The Court decided that Brian Mossop was not discriminated against on the ground of family status when he was denied the right to take bereavement leave to attend the funeral of his partner's father. As a gay man, Mr. Mossop was considered not to have a family status. The Court decided that he was discriminated against because of his sexual orientation, and since sexual orientation was not a prohibited ground in the CHRA at the time, Mr. Mossop lost.

[78] See for example, *Blake* v. *Ontario (Ministry of Correctional Services)* (1984), 5 C.H.R.R. D/2417 (Ont. Bd. Inq.). In this case, Rosetta Blake alleged that she was discriminated against when applying for a job as a correctional officer because she was a black, 50-year old woman. It is not clear from the adjudicator's decision that the particular combination of her race, sex and age, and the nature of the resistance to employing her that Ms. Blake might encounter, was fully canvassed by the adjudicator or the Ontario Human Rights Commission as Ms. Blake's representative.

[79] *Ibid.*

[80] Nitya Iyer. 1993. "Disappearing Women: Racial Minority Women in Human Rights Cases." *Canadian Journal of Women and the Law.* 6: 25.

[81] Nitya Iyer. 1996. "Charter Litigating for Race Equality."A paper prepared for the Court Challenges Program, February 1, at 12.

[82] (1993), 119 N.S.R. (2d) 91. (C.A.).

[83] *Residential Tenancies Act,* R.S.N.S. 1989, c. 401.

[84] *Supra* note 82 at 99.

[85] *Law* v. *Canada (Minister of Employment and Immigration),* [1999] S.C.R. 497 at para. 94 per L'Heureux-Dubé J.

[86] *Corbière* v. *Canada (Minister of Indian and Northern Affairs)* (1999), 173 D.L.R. (4th) 1 (S.C.C.).

[87] *Indian Act*, R.S.C. 1985, c. I-5, s. 77(1).

[88] *Supra,* note 86 para. 14-18.

[89] *Indian Act*, S.C. 1951, c. 29.

[90] Bill C-31, *An Act to amend the Indian Act,* S.C. 1985, c. 27.

[91] *Ontario (Human Rights Commission) and O'Malley* v. *Simpsons Sears*, [1985] 2 S.C.R. 536 [hereinafter *O'Malley*].

[92] *Ibid.* at 551.

[93] *Ibid.* at 555.

[94] *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11.

[95] [1989] 1 S.C.R. 143.

[96] *Ibid.* at 165 and 174.

[97] In *McKinney* v. *University of Guelph,* [1990] 3 S.C.R. 229 at 279, La Forest J., writing for the majority, acknowledged that s. 15 protects against adverse effect discrimination. He stated that, "not only does the Charter protect from direct or intentional discrimination, it also protects from adverse impact discrimination." The same acknowledgement was made in *Symes* v. *Canada,* [1993] 4 S.C.R. 695 at 755 by Iacobucci J. who stated that "it is clear that a law may be discriminatory even if it is not directly or expressly discriminatory. In other words, adverse effects discrimination is comprehended by s. 15(1)."

[98] *Supra* at note 85 para. 80.

[99] *Canadian Odeon Theatres* v. *Huck* (1986), 6 C.H.R.R. D/2682 (Sask. C.A.).

[100] *Supra* note 91.

[101] It must be noted, however, that the concept of accommodation places its own internal limitations on positive obligations because what is required is accommodation to the point of undue hardship. For commentary on this, see Shelagh Day and Gwen Brodsky. 1996. "The Duty to Accommodate: Who Will Benefit?" *Canadian Bar Review.* 75: 433.

[102] *Eldridge* v. *British Columbia (Attorney General),* [1997] 3 S.C.R. 624.

[103] *Ibid.* at 678.

[104] *Vriend* v. *Alberta (A.G.),* [1998] 1 S.C.R. 493.

[105] *Individual's Rights Protection Act,* R.S.A. 1980, c. I-2.

[106] For commentary on *Eldridge* and *Vriend* and the positive obligations of governments, see Bruce Porter. 1998. "Beyond *Andrews:* Substantive Equality and Positive Obligations After *Eldridge* and *Vriend.*" *Constitutional Forum Constitutionnel.* 9: 59.

[107] *CEDAW*, *supra* note 22.

[108] *Ibid.* Article 2(a).

[109] *Ibid.* Article 2(e).

[110] *British Columbia (Public Service Employee Relations Comm.)* v. *B.C.G.E.U* (1997), 30 C.H.R.R. D/83 (B.C.C.A.), leave to appeal to the Supreme Court of Canada granted [1997] S.C.C.A. 541 (QL), appeal heard February 22, 1999 (S.C.C. File No. 26274).

[111] *Re British Columbia (Public Service Employee Relations Commission) and B.C.G.E.U. (Meiorin)* (1996), 58 L.A.C. (4th) 159 (B.C.L.R.B.)

[112] *Supra* note 110 at D/86.

[113] *Ibid.* at D/85.

[114] *Ibid.* at D/85 and D/86.

[115] Factum of Women's Legal Education and Action Fund (LEAF) filed in the appeal to the Supreme Court of Canada in the case of *British Columbia (Public Service Employee Relations Comm.)* v. *B.C.G.E.U* (1997), 30 C.H.R.R. D/83 (B.C.C.A.) at 3-4, on file with the authors.

[116] *Thibaudeau* v. *Canada* (1994), 114 D.L.R. (4th) 261 (F.C.A.).

[117] *Supra* note 116 at 275.

[118] As well, the fact that the legislative scheme is premised on an assumption that custodial parents will be poorer than non-custodial parents, allowing the separated or divorced couple to reduce their tax liability through income splitting, was not critically examined for its gendered content. The reference to "hidden power relations" can be found in Mary Jane Mossman. 1998. "Achieving Gender Equality." *Kobe University Law Review.* 32: 21 at 40.

[119] *Supra* note 116 at 271.

[120] *Ibid.* at 269.

[121] *Ibid.* at 271.

[122] "Sex, Tax, and the *Charter*: A Review of *Thibaudeau* v. *Canada*." 1995. *Review of Constitutional Studies.* 2: 221.

[123] *Ibid.* at 247.

[124] *Supra* note 116 at 272.

[125] *Dickason* v. *University of Alberta*, [1992] 2 S.C.R. 1103 at 1191-1192.

[126] *Supra* note 116 at 272.

[127] *Ibid.* at 276.

[128] *Thibaudeau* v. *Canada*, [1995] 2 S.C.R. 627.

[129] *Supra* note 116at 292.

[130] (1995), 24 C.H.R.R. D/177 (Sask. C.A.).

[131] *Ibid.* at D/184.

[132] *Ibid.*

[133] *Ibid.* at D/179.

[134] *Ibid.*

[135] *Ibid.*

[136] *Ibid.*

[137] (1997), 27 C.H.R.R. D/365 (Can. Trib.).

[138] *Ibid.* at D/371.

[139] *Supra* note 116.

[140] *Supra* note 137 at D/372.

[141] *Ibid.*

[142] See for example, *Bliss* v. *Canada (A.G.)*, [1979] 1 S.C.R. 183.

[143] Although s. 10 states that it is a discriminatory practice for an employer or a union to pursue a policy, or enter into an agreement, that deprives an individual or class of individuals of any opportunity because of a prohibited ground of discrimination, this provision is limited in that it applies only to employment policies and practices.

[144] *British Columbia Human Rights Code*, R.S.B.C. 1996, c. 210.

[145] See *CEDAW*, *supra* note 22, Article 3. See also B.C. *Human Rights Code*, s. 3(a), *supra* note 144.

[146] A primary example of being lost between grounds is *Mossop, supra* note 77.

[147] This refers to the two sets of rights set out separately in the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights.*

[148] UN Committee on Economic, Social and Cultural Rights, *General Comment No. 9, The Domestic Application of the Covenant*, E/C.12/1998/24 (December 3, 1998) at para. 10.

[149] *Ibid.* at para. 15.

SEXUAL HARASSMENT COMPLAINTS TO THE CANADIAN HUMAN RIGHTS COMMISSION

Sandy Welsh

Myrna Dawson

and

Elizabeth Griffiths

ACKNOWLEDGEMENTS

We thank Status of Women Canada for funding the research in this report. Earlier data collection was funded by grants to the first author from the Social Sciences and Humanities Research Council and the University of Toronto Connaught New Staff Matching Grants. Annette Nierobisz and Erica Berman provided invaluable assistance during the data collection phase. We thank Lisa LeFrancois and Kimberley Terbrugge for research and editorial assistance in the preparation of this report and appreciate the copy editing work of Michael Schreiner. We are grateful for the computer expertise and help provided by Susan Underhill. The Institute for Human Development, Life Course and Aging at the University of Toronto provided excellent research facilities that allowed us to compile this report in a short time. We thank the anonymous reviewers for helpful comments. Finally, we are grateful to the Canadian Human Rights Commission for its assistance and co-operation in the collection of data. All interpretations are ours alone and should not be construed as those of the CHRC.

ABSTRACT

Sexual harassment is a common form of gender discrimination experienced by Canadian women. This study examines dispositions, remedies, length of time to case resolution and the amount of monetary compensation awarded in sexual harassment complaints reported to the Canadian Human Rights Commission (CHRC). An analysis of how various factors affect these complaint outcomes delineates the advantages and disadvantages of dealing with women's human rights violations using this process. Policy and research recommendations are also outlined.

An analysis of 453 sexual harassment complaints filed by women against both corporate and individual respondents between 1978 and 1993 is presented in this report. Of the total sample, there are 295 complaints against corporate respondents and 158 against individual respondents. Descriptive and multivariate analyses illustrate how the complaints-based model is working and identify the factors for predicting various dispositions and remedies.

Three types of dispositions are available in sexual harassment complaints: formal settlement, dismissal or "no further proceedings" (often informal settlements). Complaints against corporate respondents are more likely to be formally settled than complaints against individual respondents. In general, when the complainant experiences psychological distress and when *quid pro quo* harassment occurs, the complaint is formally settled. Complaints take an average of two years to reach a disposition. Formal settlements reached through conciliation require the longest time to resolve. Monetary compensation is the most common remedy for complaints settled formally or informally. Corporate respondents pay more monetary compensation for poisoned environment harassment than *quid pro quo* harassment.

The results of this report demonstrate that workplace sexual harassment is a pervasive problem for women in Canada. This comprehensive analysis of the CHRC complaint process suggests that improvements in time to case resolution and ease of reporting without repercussions should be important components of future policy agendas promoting the status of women in Canada.

TABLE OF CONTENTS

TABLES AND FIGURES 181

EXECUTIVE SUMMARY 182

1. INTRODUCTION 185
   Background 185
   Filing a Complaint with the CHRC 186

2. DATA AND METHODS 188
   Descriptive Statistics 188

3. RESEARCH FINDINGS 191
   Disposition of Complaints 191
   Remedies for Sexual Harassment Complaints 195
   What Factors Predict the Amount of Monetary Settlements? 200
   What Can We Conclude about Sexual Harassment Complaint Remedies? 201

4. POLICY RECOMMENDATIONS AND CONCLUSIONS 202
   Policy Recommendations 202
   Recommendations for Future Research 203
   Conclusion 204

BIBLIOGRAPHY 205

APPENDIXES
A: DESCRIPTION OF VARIABLES 208
B: MULTIPLE REGRESSION ANALYSIS FOR TIME TO RESOLUTION 212
C: MULTIPLE REGRESSION ANALYSIS FOR MONETARY AWARD 213

ENDNOTES 214

TABLES AND FIGURES

Tables

1 Type of Remedy by Significant Factors 197

B-1 Coefficients for Regression of the Amount of Time to Resolution on Various Case Characteristics, 1978-1993, Female Complainants, Corporate Respondents 212

C-1 Coefficients for Regression of the Amount of Monetary Award in Settled Cases on Various Case Characteristics, 1978-1993, Female Complainants, Corporate Respondents 213

Figures

1 Dispositions by Type of Respondent 192

2 Average Time to Resolution by Disposition 194

3 Remedies by Disposition 196

4 Remedies by Type of Respondent 198

5 Remedies by Year Opened 199

6 Average Amount of Money by Disposition 200

EXECUTIVE SUMMARY

Women's vulnerability to sexual harassment in the workplace is pervasive and widespread. Currently, the Canadian Human Rights Commission (CHRC) follows a complaints-based model to protect women from discrimination and harassment at work. This model was implemented in the late 1970s to encourage women who experience sexual harassment to file formal external complaints against corporations and individuals explicitly engaging in, or implicitly allowing, the sexual harassment to occur. This report has four primary goals.

- Identify the dispositions that result from sexual harassment complaints.
- Determine the predictors of the length of time to case resolution.
- Describe the types of remedies used to resolve these complaints.
- Determine the predicting factors for various dispositions and remedies, including the amount of monetary compensation received by a complainant.

This research examined 453 sexual harassment complaints filed by women against corporate and individual respondents between 1978 and 1993. During this period, there were 295 complaints filed against corporate respondents and 158 complaints against individual respondents. Complaints could result in a settlement, a dismissal, or "no further proceedings" (including private settlements).

Disposition of Complaints

Complaint dispositions differ between corporate and individual respondents.

- Complaints against corporate respondents are more likely to be formally settled through conciliation while a disposition of "no further proceedings" is more likely to occur in complaints against individual respondents.
- About one third of all complaints are dismissed.
- Several factors increase the probability that a complaint will result in a formal settlement imposed by the CHRC:
  - psychological distress experienced by the complainant;
  - evidence of *quid pro quo* sexual harassment;
  - conciliation; and
  - complaints filed after the *Robichaud* v. *Brennan* case which established employer liability for sexual harassment complaints.

Time to Resolution of Complaint

Complaints are resolved, on average, two years after they are initially filed.

- For both types of respondents, formal settlements are reached more slowly than dismissals or complaints that end in "no further proceedings."

- Complaints that go through conciliation take the longest to reach a resolution.

- Complaints against corporations with a history of prior allegations, complaints involving more than one harasser and complaints against employing organizations with higher annual sales also take longer to resolve.

Remedies for Settled Complaints

The four most common remedies employed in sexual harassment complaints, settled formally and informally, are monetary compensation, a letter of apology, harassment-sensitivity classes and the development or amendment of harassment policies in the workplace.

- Monetary compensation is awarded more often against corporate respondents when there is a prior history of allegations, in cases of poisoned environment harassment and when conciliation occurs. In addition to these last two factors, complaints against individual respondents are also more often resolved through monetary compensation when the complainant is no longer in the job and when multiple harassers are identified.

- Although letters of apology are more likely to be ordered against individual respondents, corporate respondents have been required to provide these more frequently in complaints filed between 1990 and 1993.

- Individual respondents who harassed more than one individual and corporations involved in poisoned environment harassment are more often ordered to take harassment-sensitivity classes.

- Corporate respondents were required to develop policies more often between 1978 and 1983. This is likely due to the relative "newness" of sexual harassment legislation during this period.

Amount of Monetary Compensation Awarded

Monetary awards compensate the complainant for lost wages, legal expenses and "hurt feelings" as a result of the sexual harassment.

- The average amount awarded for complaints that end in "no further proceedings" is almost double that awarded in cases formally settled by the CHRC.

- Complainants who are no longer in their jobs when the complaint is filed and who work in female-dominated industries receive the highest amount of monetary compensation from corporate respondents.

- Corporate respondents pay less money to complainants if the harassment is *quid pro quo* rather than poisoned environment harassment.

Research and Policy Recommendations

- Conciliation after a CHRC investigation should not be abandoned because, while the process may be slower, the outcomes are better for complainants.

- Immediate relief needs to be provided to women experiencing harassment and attempting to address the situation through the CHRC.

- There needs to be more use of structural remedies that alter the culture of the workplace. While it is important to provide compensation for those complainants who have already suffered sexual harassment in the workplace, it is equally important to reduce the amount of future sexual harassment that may occur.

- A national study should be undertaken to assess the content and effectiveness of current sexual harassment policies and processes in employing organizations.

- Research attention needs to focus on the benefits and costs of mediation as a quick and effective solution to sexual harassment complaints. Currently, early mediation for such complaints is the latest proposed solution, but there is little (if any) research in this area.

1. INTRODUCTION

Women who file complaints to the Canadian Human Rights Commission (CHRC) do so with little knowledge about possible outcomes for their complaints. This report describes and analyzes a specific group of human rights complaints to the CHRC: sexual harassment complaints by women.[1]

We provide detailed information about CHRC processes and outcomes. These results can be compared, in the future, to other models of complaint resolution to discover the types of complaint processes that lead to better remedies for women. We also examine how long it takes for complaints to reach a disposition and the types of remedies women can expect from this process. We conclude with research and policy recommendations that document the additional information required to assess, more adequately, the complaint process, to highlight areas in which the Canadian Human Rights Commissions' process has been effective and to suggest ways for improving the process for future complainants. We collected data for this report from 453 sexual harassment complaints to the CHRC between 1978 and 1993.

Background

In 1978, the CHRC recognized sexual harassment as a form of discrimination prohibited under the *Canadian Human Rights Act*. Since then, studies have documented the extent of sexual harassment in Canada. A 1992 survey of Canadian women found that 43 percent experienced sexual harassment in the preceding year (Gruber 1998; see also Welsh and Nierobisz 1997; CHRC 1983). All women, including those in professional occupations and blue-collar jobs, face the risk of sexual harassment (Backhouse and Cohen 1979).

To date, most research on outcomes and resolutions that arise from sexual harassment experiences is based on surveys of sexual harassment victims and has tended to focus on the informal coping mechanisms used by women subjected to sexual harassment (e.g., Tangri et al. 1982; Gruber and Smith 1995). This research shows that women are more likely to avoid their harassers than to report the harassment even when internal complaint procedures or external forums, such as the CHRC, are available to them. Although these studies lay the groundwork for understanding the types of policies needed to combat sexual harassment, they only touch on the issue of formal complaint resolution and what factors lead to various dispositions.

Researchers are now beginning to examine which policies are effective for sexual harassment complaints (Cleveland and McNamara 1996; Gutek 1996; Rowe 1996). Because of the relative "newness" of sexual harassment as a legal form of discrimination (Backhouse and Cohen 1979; MacKinnon 1978), most of these analyses are based on conceptual frameworks or anecdotal evidence derived from consultations with employing organizations. In their analysis of university employees, Lindenberg and Reese (1996) found that many employees are dissatisfied with their workplace sexual harassment policies and, in particular, are

concerned with confidentiality, fairness and perceived lack of organizational response. In general, these recent sexual harassment policy evaluations should be "considered hypotheses in a field with virtually no large-scale research" (Rowe 1996: 243).

Given the lack of research on harassment policies in general, it is not surprising that few studies have examined external complaint procedures. The few studies available are based primarily on U.S. court and federal agency data (e.g., Coles 1986; Terpstra and Baker 1988). These studies document the characteristics of complaints. They also provide some understanding of the factors that are important in settling complaints.

Research on sexual harassment complaints in Canada is even more limited. Although the CHRC and provincial human rights commissions are critiqued for being slow moving and unresponsive to complainants' needs (Grahame 1985; Howe and Andrade 1994), few comprehensive studies on complaints to the CHRC are available. Frideres and Reeves (1989) examined sex- and race-based complaints. They found important differences between complaints of individual discrimination, such as sexual and racial harassment, and complaints relating to systemic discrimination. Complaints of harassment tend to rely primarily on the testimony of individuals, while systemic discrimination complaints rely on formal evidence such as payroll and personnel documents. Subsequently, reliance on individual testimony that may change over time or witnesses that cannot be located, in part, results in lower rates of settlement for harassment complaints compared to systemic discrimination complaints.

The CHRC plays an important role in adjudicating human rights complaints for women. In many ways, one might consider this quasi-judicial agency to be the "court of last resort" for sexual harassment complainants in federally regulated workplaces. In Canada, complainants are not able to file civil lawsuits against their employer. These lawsuits are a potential avenue for complainants in the United States and a mechanism that can serve to bring employers in line, especially when multi-million dollar damages are awarded. This is not to say that the U.S. civil liability framework is preferred. Rather, it merely highlights the importance of both federal and provincial human rights commissions for protecting human rights. In the case of sexual harassment, complainants often turn to the CHRC after exhausting internal or union complaint procedures. When the federal human rights commission does not function properly, complainants have few options in attempting to have their human rights violations remedied.

Filing a Complaint with the CHRC

Once a complaint is filed with the CHRC, an investigation is conducted. According to official CHRC documentation (CHRC 1998), a human rights investigator will ask the complainant for evidence to support the complaint. The investigator may also gather evidence from co-workers and other individuals who have pertinent information. During the investigation, the CHRC will attempt to settle the complaint. Once an employer or individual is informed that an investigation has begun, he or she may offer to make amends. If the complainant is satisfied, then the complaint will be settled,[2] the investigation ceases and the complaint is closed.

Following an investigation in which the complaint is not settled, the investigator supplies commission members with a report based on the evidence collected. Complainants and respondents also may make submissions based on the investigation report. These submissions, along with investigation reports, are considered by the Commission in making its decisions. Based on this information, commissioners then decide among the following options:

- a conciliator is appointed to resolve the complaint;
- the complaint is referred to the human rights commission; or
- the complaint is dismissed because there is not enough evidence demonstrating discrimination or harassment.

Finally, in terms of settlements, the focus is on remedying the situation and making the complainant "whole" by compensating for "hurt feelings" or other damages resulting from the harassment or discrimination. The whole process is remedial, not punitive.

While the CHRC provides a straightforward complaint procedure, it is important to remember that filing a formal complaint is still a rare and costly event for victims of sexual harassment. Since the early 1980s, research has consistently shown that women who have experienced sexual harassment infrequently confront the harasser or report the behaviour to someone in authority. The number of women who do file a grievance or complaint is even smaller. Various studies examining a wide range of occupations and work environments reveal a consistent pattern. While approximately half of all female employees experience sexual harassment, less than one quarter report it to an authority and fewer than one in 10 actually file a formal grievance (Fitzgerald et al. 1995; Gruber and Smith 1995). When complainants do file a report, however, there is a cost to reporting harassment. Welsh and Gruber (1999) found that reporting sexual harassment has an independent negative effect on women's work and personal lives, above and beyond the effect of the sexual harassment.

Women reporting the harassment experience more adverse outcomes than non-reporters. Thus, women who do report their sexual harassment to the CHRC, which is the focus of our study, have shown tremendous perseverance in trying to find a remedy for their harassment experiences. As a result, it is crucial that the CHRC remove any additional barriers that prevent the reporting of sexual harassment. CHRC procedures should not contribute to the adversity these women experience when they do file a complaint. The findings of the 1998 report by Renée Dupuis on CHRC sexual harassment complaint procedures point to some recommended changes to CHRC procedures. This report should be considered a complementary companion piece for our report. In our research, by examining the outcomes, remedies and amount of time to case resolution of sexual harassment complaints to the CHRC, we gain insight into how the CHRC helps women and where they may inadvertently place further roadblocks in the way of women's pursuit of their human rights.

2. DATA AND METHODS

We collected data from sexual harassment complaints lodged with the Canadian Human Rights Commission between 1978 and 1993. We assembled the data by reading and coding information from investigators' case files. These files contain detailed records of the sexual harassment, investigation process and complaint resolution. Sexual harassment complaints were identified using the designation developed by the CHRC that classifies sexual harassment complaints under section 14 of the *Canadian Human Rights Act* and under the grounds of sex or sexual harassment. All complaints coded for analysis were filed in this manner. Only those complaints that were closed (e.g., dismissed, "no further proceedings," settled) by December 1995 were coded. Complaints still in process were not coded.

After reading through several investigator reports, we developed a coding instrument that captured details about the complaint including the type of organization where the alleged harassment occurred, the type of harassment behaviour and the closure resolution. Supporting documents and letters found in investigator reports were used to clarify information. Due to the confidential nature of these reports, all the complaints were coded by the first author and two graduate research assistants at the CHRC offices in Ottawa, under guidelines laid out in a contract between the CHRC and the first author. The 453 complaints used in our analysis represent the total population of workplace sexual harassment complaints against corporate and individual respondents filed by female complainants with the CHRC between 1978 and 1993 and closed by 1995. Not included are sexual harassment complaints against service providers.

Prior to the mid-1980s, complaints could be filed against corporate respondents only. These complaints contained allegations against the employer for not providing a harassment-free workplace and for differential treatment. The complaints also included allegations against specific individuals in the workplace for engaging in harassing behaviours. Yet in some circumstances, the employer would not be held liable for the harassment by an employee.[3] Hence, in the late 1980s, the CHRC began to take complaints against individual respondents. Most of the complaints against individual respondents were filed after 1989, with only 16 filed between 1985 and 1988. Because individual and corporate respondents are distinct, especially in terms of the types of potential remedies, analyses are done separately on complaints against individual and corporate respondents.

Descriptive Statistics

This section describes the characteristics of both the corporate respondent sample (n = 295) and the individual respondent sample (n = 158). Variable descriptions are provided in Appendix A. We describe corporate and individual respondents separately because, as our analysis shows, there are some striking differences between these types of respondents in terms of complaint disposition and remedies.

Over one third of the complainants in the corporate respondent sample and close to 40 percent in the individual respondent data experienced some form of psychological distress or damage as a result of the sexual harassment. Most complainants in both samples (about 70 percent) were no longer in the job where the harassment occurred when the complaint was filed with the CHRC. A large proportion of these women had quit, been fired or forced to resign. A smaller number were on sick leave, transferred to another position or demoted.

Close to half of the cases against corporate respondents were filed between 1990 and 1993. This may reflect both public awareness of sexual harassment in the early 1990s as well as the importance of the 1989 Canadian Supreme Court decision in *Janzen* v. *Platy*. In *Janzen*, the Supreme Court confirmed that sexual harassment is a form of sex discrimination.[4] In contrast, most complaints (87 percent) against individual respondents were filed during this later period, in part, because the CHRC did not accept complaints against individuals until the late 1980s.

In the corporate respondent sample, about 41 percent of the cases involved more than one harasser, and over one quarter involved more than one complainant. The proportion of multiple harassers and victims was lower for individual respondents, 30 and 20 percent respectively. In both samples, most complaints involved alleged harassers with supervisory authority over the complainant. This includes both those with a formal title of supervisor as well as instructors or other workplace leaders. Nearly 25 percent of the complainants in the corporate sample and over half of the complainants in the individual respondent data held temporary or probationary positions, suggesting some organizational vulnerability for these individuals. Overall, less than one quarter of the complainants were in a managerial or professional position; most were in what would be referred to as pink- or blue-collar jobs.

The type of harassment experienced by complainants was evenly split between *quid pro quo* sexual harassment and poisoned environment harassment for both corporate and individual respondents. *Quid pro quo* harassment involves unwanted sexual attention that may include being stared at or inappropriately touched. In other words, this type of harassment involves behaviours that are overtly sexual and directed at particular individuals. Poisoned environment harassment includes both gendered and sexually derogatory comments and actions that may permeate the workplace. While some of the harassment in this latter group of cases was personally directed at particular individuals, other harassment, such as the presence of sexual posters and general comments about the inability of women to perform jobs, was not.

On a per-province basis, about 40 percent of the employing organizations had had prior sexual harassment complaints filed against them. Among this group, the average number of previous complaints was about six or seven within the province where the employing organization was located. Nationally, about 56 percent of the employing organizations had previous complaints filed against them, with the average number of previous complaints among this group being about nine or 10. This figure represents the total number of complaints filed against a company regardless of the province in which its branches were located.

During the complaint process, the CHRC has the option of sending a case to conciliation in an effort to facilitate an agreement between or among the parties involved. This generally occurs when the investigation found evidence of sexual harassment and where there was some likelihood the complainant and respondent might reach a settlement. Close to one quarter of the corporate cases were sent to conciliation while about 20 percent of the complaints against individual respondents were directed through that process.

For both the individual and corporate respondent sample, over half the complaints were filed against private, non-governmental organizations (NGOs).

In the corporate sample, just over half the complaints originated from industries that had an equal proportion of male and female employees. About 36 percent came from male-dominated industries (where less than 30 percent of the employees were female) while 10 percent were from female-dominated industries (where more than 60 percent of the employees were female).

The numbers varied slightly for individual respondents. In these cases, close to 60 percent of the complaints originated from industries with an equal proportion of male and female employees. About 27 percent came from male-dominated industries while 16 percent were from female-dominated industries.

The average size of the employing organization for individual and corporate respondents was 78,528 and 56,949 employees, respectively. Annual sales, on average, were approximately $9,387,743,798 for corporate respondents and $3,947,407,846 for individual respondents.[5]

3. RESEARCH FINDINGS

We now turn to our research findings. We begin with a discussion of the disposition of complaints, followed by an analysis of the average amount of time to resolution for complaints. The third, and final, component of our analysis focusses on remedies for settled complaints. We provide a separate analysis of the amount of monetary compensation the complainants received.[6]

Disposition of Complaints

The CHRC complaint process can lead to various types of dispositions. Some complaints are settled in the course of an investigation or as a result of conciliation. Some are dismissed while others proceed to a human rights tribunal. Settlements are agreed to by the various parties in the complaint and approved by the CHRC. Settlements usually result in some type of remedy for the complainant. Remedies include monetary compensation for the harassment, payment of lost wages, a letter of apology or an amendment of the employer's sexual harassment policy. The next most common disposition is dismissal, followed by "no further proceedings." The latter occurs when the CHRC does not pursue a complaint because it has been withdrawn or the matter resolved as a result of a private settlement between the complainant and the respondent.

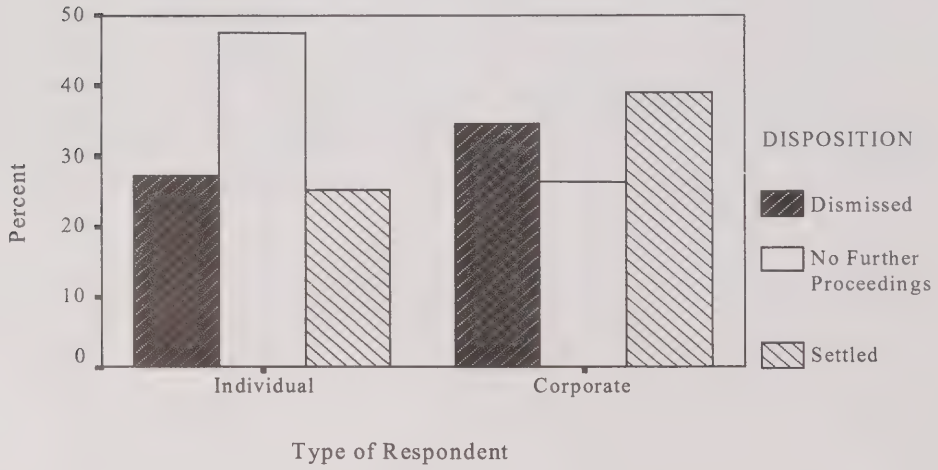
A different disposition pattern exists for complaints against corporate and individual respondents. (See Figure 1.) Complaints against corporate respondents are significantly more likely to be settled than complaints against individual respondents (39 and 25 percent, respectively). The higher settlement rate for corporate respondents may be due to legal liability issues and the CHRC's remedial mandate. That is, corporate respondents are in a position to alter the work environment by enforcing their sexual harassment policy or requiring their employees to take harassment-sensitizing classes. Individual respondents, while able to apologize for their behaviour, cannot necessarily provide a more "structural" remedy for the workplace as a whole. Complaints against individual respondents are significantly more likely to result in dispositions of "no further proceedings" compared to corporate respondents. (See Figure 1: 48 percent of individual respondents and 26 percent of corporate respondents.) Often, when the complainant settles with the corporate respondent, remedies involving the individual respondent are not pursued. Finally, there is no significant difference between individual and corporate respondents in the rate of dismissal: almost 35 percent of complaints against corporate respondents are dismissed compared to 27 percent against individual respondents.

What Factors Predict the Settlement of Complaints?

Overall, variables related to legal and CHRC procedures predict complaint settlement. In earlier research on the sexual harassment complaint data, we (Welsh et al. 1999) found that complaints to the CHRC are more likely to be settled if the complainant experienced psychological distress, experienced *quid pro quo* harassment as opposed to poisoned environment harassment, and if the complaint was lodged after the Review Tribunal

overturned the lower tribunal's decision in *Robichaud* v. *Brennan* in 1983. (This case established employer liability for sexual harassment complaints.) Complaints sent to conciliation are also more likely to be settled than other complaints. According to the CHRC, this can be interpreted as showing that the CHRC "makes good decisions" about the complaints that will result in settlement. This finding highlights the role of CHRC organizational processes in complaint outcomes.[7] We address the role of conciliation in our discussion of the amount of time taken to resolve complaints.

Figure 1: Dispositions by Type of Respondent
(Corporate and Individual Respondents, N = 453)



Welsh et al. (1999) point out that one troubling aspect about settled complaints is the positive relationship between complainants' acknowledgement of psychological distress and complaint settlement. On the one hand, this relationship is consistent with Canadian case law. Since the 1980 Ontario Board of Inquiry in *Bell* v. *Flaming Steer Steakhouse*, the complainant's psychological damage is regarded as a marker of harassment that is considered a condition of employment. Yet, it is important to note that the role of psychological distress in sexual harassment complaints is the focus of some legal debate. In the United States, since the 1993 Supreme Court decision in *Harris* v. *Forklift Systems*, the court has attempted to move away from proving psychological injury in complaints of poisoned environment harassment. Based on the results of our earlier analysis, it appears that in Canada experiencing sexual harassment and/or facing a poisoned work environment is not enough. Instead, complainants who mention some type of psychological consequence due to the sexual harassment are more likely to reach a settlement. It appears that for sexual harassment complaints, women who produce an image of themselves as psychologically damaged are more likely to gain a settlement for their complaints. According to Carol Smart (1995), this is an example of how

the law is gendered, in that it produces a particular image of the sexual harassment victim as psychologically unstable. Overall, however, it is the legally relevant and organizational processing factors, such as conciliation, that predict what complaints will be settled. This leads us to believe that the CHRC is using appropriate criteria, albeit within a gendered legal context.[8] Given the regular occurrence of psychological distress for sexual harassment victims, our research also leads us to concur with the recommendations of Dupuis (1998: 27) that the CHRC include a supplementary measure in settlements that would "oblige the respondent to defray the costs of psychological support for the victim, where appropriate."

Length of Time to Resolution of Complaint

Researchers and activists have levelled criticisms against human rights commissions in Canada over the time it takes to resolve such complaints (Grahame 1985; Howe and Andrade 1994). Human rights commissions, in general, and the CHRC in particular, are seen as slow-moving institutions that do not respond in a timely manner to the needs of complainants.[9]

On average, it takes two years to resolve complaints. The time to resolution varies by the type of resolution. (See Figure 2.) Complaints resulting in a settlement take the longest: complaints against corporate respondents take almost two and a half years (30 months) and complaints against individual respondents take 26 months. For complaints against corporate respondents, dismissals or "no further proceedings" are reached after about 20 or 22 months. For complaints against individual respondents, dismissals are reached, on average, in 23 months, while "no further proceedings," resolutions are reached in about 19 months.

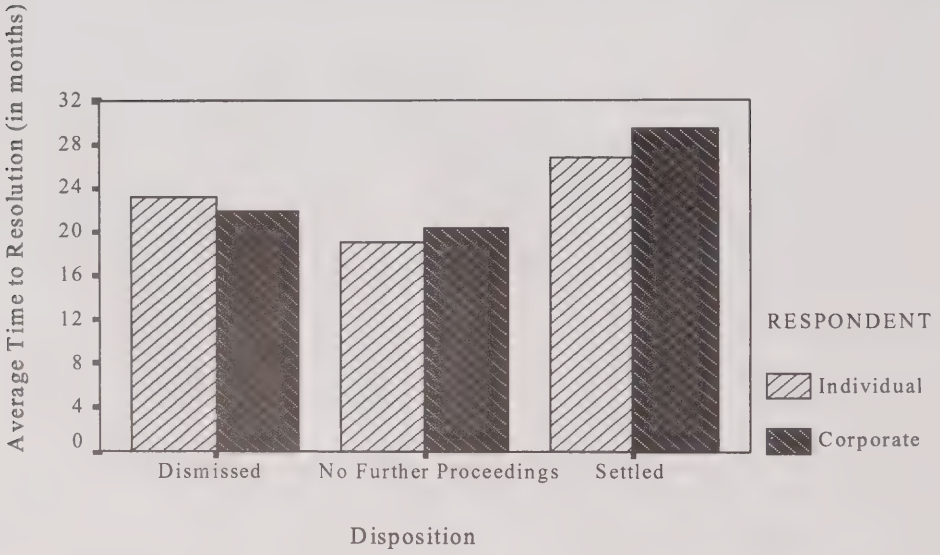
What Factors Predict Time to Complaint Resolution?

We performed multiple regression analyses to determine the likelihood of certain types of complaints taking longer to reach a resolution for the corporate respondents sample only.[10] Appendix B contains the results of this analysis. We briefly summarize the results below. Complaints filed during the middle years of our study (1984 to 1989), those against respondents with a history of prior complaints and those cases sent to conciliation were likely to take more time to reach a resolution. As well, if more than one complainant was involved in the case, time to resolution increased. In addition, as annual sales for an employing organization increased, so did the time to case resolution. It is possible that employers with higher sales or "deep pockets" may be able to stall or delay CHRC proceedings. For example, companies can accomplish this by filing appeals of CHRC decisions. A second possible explanation is that higher sales are a proxy for having (and being able to afford) full-time human rights staff that may make it possible for more detailed responses to CHRC complaints. Further research is required, however, to explore the reasons behind this finding.

As indicated above, complaints take approximately two years to reach their final disposition. Since testimonial and circumstantial evidence are the most common type of evidence in sexual harassment complaints, complaints that take a long time to settle run the risk of losing crucial evidence due to inaccurate memory on the part of witnesses (Dupuis 1998: 24). One contributing factor may be the increased time it takes for a case to go through the conciliation process. This conundrum highlights the problem faced by the CHRC. The Commission is criticized for being too slow, yet also faces criticism if the public perceives complaints as not

being handled fairly. However, conciliation, after an investigation, appears to offer the best chance for fair remedies but at the cost of a longer process. Part of the time taken to get to resolution may be due to the fact that the case must go before the Commission twice for a decision—once after investigation and then to approve the settlement. In terms of positive settlements for complainants, more time to resolve the complaint may be needed. Dupuis (1998: 24) also points out that during the investigation as much evidence as possible needs to be collected to avoid problems of inaccurate memory and missing witnesses. This means more time may be needed to investigate fairly and settle sexual harassment complaints. As Johnson and Howe state, "rushed justice is often justice denied" (1997: 16).[11]

Figure 2: Average Time to Resolution by Disposition
(Corporate and Individual Respondents, N = 453)



One final factor for consideration is that most complainants have quit their jobs, been fired or taken sick leave by the time their cases are filed with the CHRC. For these complainants, the two-year (or more) average time to resolution is too long. It brings with it added financial hardship and forces complainants to wait for any remedies that may be forthcoming. Also problematic is the lack of immediate relief in their harassment situation. Some may say it is not the role of the CHRC to stop the harassment in the short term, but rather to provide remedies for anti-social conditions in the long term. However, it is necessary to point out that women in Canada have little recourse for immediate relief from sexual harassment or other human rights violations. By forcing complainants to wait for over two years for a disposition, the CHRC hampers women's abilities to move on from their harassment experiences. As research shows, for some women, the sexual harassment complaint process adds to the harm of the initial harassment (e.g., Welsh and Gruber 1999; Stambaugh 1997).

Remedies for Sexual Harassment Complaints

In this section, we examine, in particular, the difference between settlements and remedies that come earlier in the process compared to those that come later.

The CHRC uses several remedies to address sexual harassment complaints. The four most common are letters of apology from the corporate or individual respondent, monetary compensation, development of, or amendment to, a sexual harassment policy and harassment-sensitizing classes. Other less common remedies include transfer of the complainant to a new position, distributing the company's sexual harassment policy to all employees, posting a formal letter of apology and setting up appropriate procedures so complaints are handled quickly. We are not able to evaluate whether or not respondents view these remedies favourably. Those interested in this issue are referred to Dupuis' discussion (1998: 19-20) of the mismatch between sexual harassment complainants' expectations and the remedies available. The analyses focus on the four most common remedies: letters of apology, monetary settlement, harassment-sensitizing class and development of sexual harassment policies. This analysis also examines only those complaints that were officially endorsed by the CHRC or reached an informal or private settlement. If we think of remedies from "no further proceedings" resolutions as similar to privately mediated settlements, we gain some insight into remedies outside the CHRC. Comparing these remedies to those from CHRC officially endorsed settlements may highlight where the complainants stand to gain (or lose) from settlements occurring outside the CHRC.

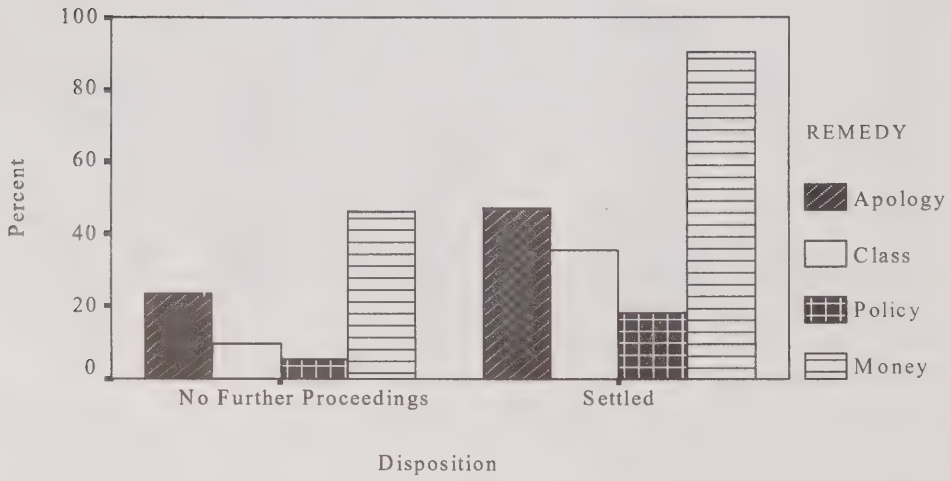
Figure 3 presents the four types of remedies (letter of apology, harassment-sensitizing class, creation or amendment of sexual harassment policy, and monetary compensation) for settled and "no further proceedings" complaints. Monetary compensation is the most common type of remedy for both settled and "no further proceedings" complaints (approximately 90 percent vs. 48 percent respectively). A letter of apology to the complainant is the second most common remedy for both types of complaints. This is followed by harassment-sensitizing classes. Creation or amendment of a sexual harassment policy is the least common remedy, occurring in about 18 percent of the settled complaints and five percent of the "no further proceedings" complaints.

Significant differences exist in the type of remedies for settled and "no further proceedings" complaints. Settled complaints, where the commissioners have approved the settlement, are more likely to lead to monetary compensation, a letter of apology and harassment-sensitizing classes than are "no further proceedings" settlements (or what can be called informal settlements).

Officially sanctioned settlements also include a wider variety of remedies compared to informal settlements. More than one remedy is applied in almost two thirds of officially sanctioned settlements, while only one third of the informal settlements have more than one remedy. Based on these findings, the CHRC appears to be more effective at ensuring comprehensive or systemic remedies than would occur with negotiated informal settlements. As an example of this, for both individual and corporate respondents, officially sanctioned

settlements are significantly more likely to include harassment-sensitizing classes than informal settlements. For respondents who negotiate informal settlements, this educational and structural remedy may be avoided. Also at issue is the fact that human rights processes were initially designed to be "lawyer-less," thus reducing the expense for the complainant and respondent. While we have no information on the number of lawyers or other outside legal assistance used in complaints, it is possible that those complainants who mediate or negotiate outside of the CHRC conciliation process may be at some disadvantage when it comes to remedies. Future research needs to examine whether or not legal representation makes a difference for remedies. In the following section we look at the four types of remedies more closely.

Figure 3: Remedies by Disposition
(Corporate and Individual Respondents, N = 248)



Letters of Apology

Letters of apology from the respondent to the complainant occur in about 32 percent of complaints against corporate respondents and 48 percent of complaints against individual respondents. (See Figure 4.) Letters of apology are most likely to occur in complaints against corporate respondents when the complainant is still in the job where the harassment occurred, is a manager or professional, and is complaining of poisoned environment harassment. (See Table 1 for a description of the significant effects.) Letters of apology appear to be a "newer" remedy for corporate respondents in that they are more likely to occur in the 1990 to 1993 period. (See Figure 5.)

Conciliation also results in significantly more letters of apology than complaints settled without conciliation. (See Table 1.) For individual respondents, letters of apology occur in

slightly different complaints. This remedy is likely when there are no prior complaints against the employing organization, when the complaint is settled through conciliation or when the harassment involved multiple harassers and complainants.

Table 1: Type of Remedy by Significant Factors[a]
(Individual and Corporate Respondents)

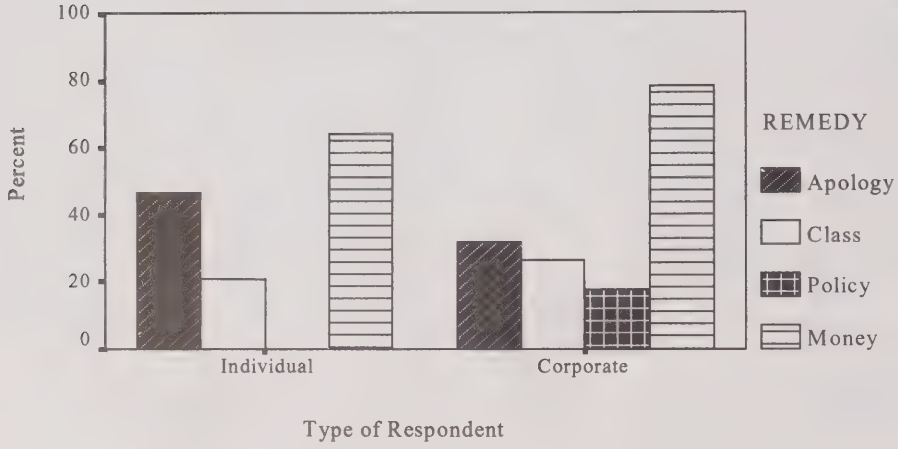
		Remedy			
		Monetary Compensation	Letter of Apology	Harassment-Sensitizing Class	Creation of Policy [b]
Complainant out of job	Individual Corporate	+ 	 -		
Poisoned environment	Individual Corporate	+ +	 +		
Complaint opened 1978-1983	Individual Corporate				 +
Complaint opened 1990-93	Individual Corporate		 +		
Prior complaint	Individual Corporate	 +	- 		 -
Sent to conciliation	Individual Corporate	+ +	+ +	+ +	
Complainant is manager/ professional	Individual Corporate		 +		
Multiple harassers	Individual Corporate	+	+		
Others harassed	Individual Corporate		+	+	 +
Small organization	Individual Corporate				 +
Female-dominated industry	Individual Corporate	+ +	+ +		 +

Notes:
[a] Positive signs indicate that a variable increases the odds that a particular type of remedy will be used while negative signs indicate that a particular variable decreases the odds that a type of remedy will be used.
[b] Policy creation/amendment is not a relevant remedy for individual respondents.

Sexual Harassment-Sensitizing Classes
Harassment-sensitizing classes are invoked for about 27 percent of the complaints settled against corporate respondents and 20 percent against individual respondents. (See Figure 4.)

For both individual and corporate respondents, complaints that go through conciliation are more likely to result in harassment classes than other complaints. For corporate respondents, classes are more likely to be used when complaints involve poisoned environment harassment. Complaints against individual respondents result in harassment classes when others in the workplace have been harassed. This is indicative of a chronic problem on the part of the individual respondent and is best remedied by education and awareness about what is sexually harassing behaviour.

Figure 4: Remedies by Type of Respondent
(Corporate and Individual Respondents, N = 243)

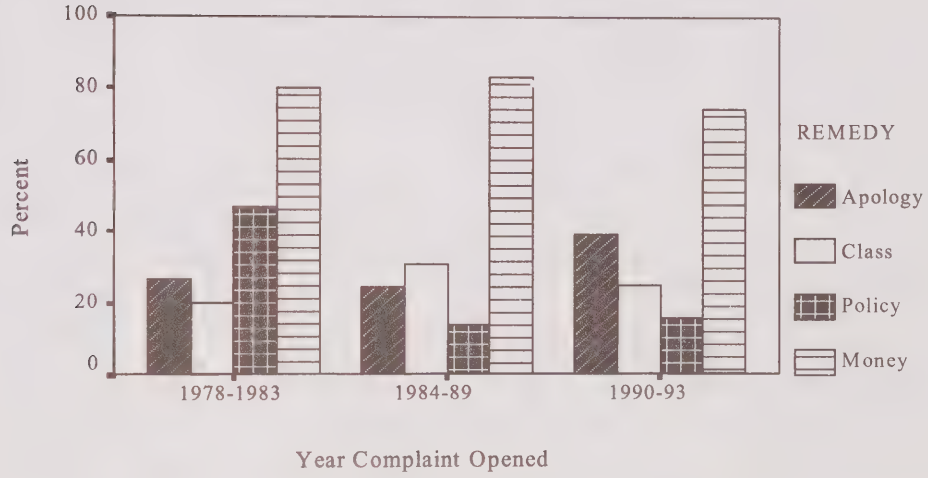


Harassment Policy Implementation or Amendments

Creation of, or amendments to, sexual harassment policies occur in about 18 percent of the complaints. (See Figure 4.) Policies were more likely to be a remedy in the early years of complaints, 1978 to 1983. (See Figure 5.) During this period, employers either had no policies or minimal policies in place. Clearly, in more recent years, policies have not been applied as frequently as a remedy. By the mid to late 1980s, most companies had some type of policy in place. In part, this is due to the 1985 amendment to the *Canada Labour Code* that made it mandatory for all federally regulated employers to adopt an internal sexual harassment policy. Although broad guidelines are given regarding policy content (e.g., that employees are entitled employment free of harassment, an explanation of how complaints may be brought to the attention of the employer), what is not known and what is needed is information about the types of policies and their effectiveness within organizations.[12] The existence of a policy does not mean it is effective. If a complaint has reached the CHRC that was not initially addressed by an organization's internal complaint policy, this may indicate a problem with the policy itself. Although more research is needed on what are effective sexual harassment policies, the CHRC could ask companies to evaluate and amend their policies to a

greater degree than they are doing now. Related to this, corporate respondents with prior complaints against them are less likely to be asked to create or amend their sexual harassment policy. (See Table 1.) At first glance, this may seem counterintuitive. But it is likely that corporate respondents with prior complaints were previously asked to develop a policy. Smaller organizations and organizations where others were harassed are more likely to be asked to develop or amend their policy than other organizations. In contrast to the other three remedies, conciliation does not make a significant difference for the creation of a policy.

Figure 5: Remedies by Year Opened
(Corporate Respondents, N=157)



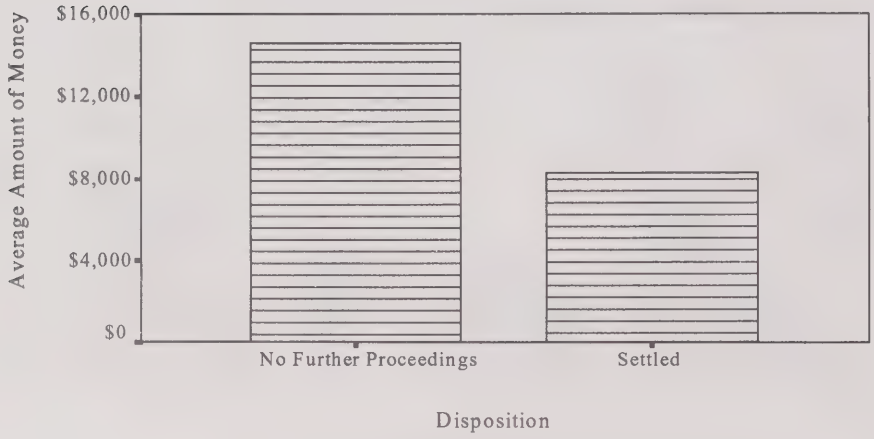
Monetary Settlements

Seventy-eight percent of the settled complaints against corporate respondents and 66 percent of settled complaints against individual respondents result in a monetary award. (See Figure 4.) We also examined whether various factors were significantly related to monetary remedies. (See Table 1.) For complaints against corporate respondents, monetary compensation occurs more often for poisoned environment harassment, when there have been prior complaints against the employing organization and complaints going through conciliation. For complaints against individual respondents, complainants are more likely to be compensated when they are no longer in the job where the harassment occurred, when it is poisoned environment harassment, when there are multiple harassers and when the complaint goes through conciliation.

Amount of Monetary Compensation

How much money do complainants receive for successful sexual harassment complaints? For many complainants, money is an important part of the remedy since it may cover lost wages, legal expenses and compensation for "hurt feelings" or personal damages arising from the sexual harassment. Because monetary settlements are a source of concern for both complainants and respondents alike, it is important to examine the relationship between characteristics of sexual harassment complaints and the amount of monetary settlements.

Figure 6: Average Amount of Money by Disposition
Average Amount of Money by Dispositions
(Corporate Respondents, N = 123)



To determine how much money complainants receive, we examine two types of settled complaints—those where there is a formal settlement sanctioned by the CHRC (Minutes of Settlement form included in file) and those where the complaint was listed as "no further proceedings" due to a private settlement between the complainant and respondent. "No further proceedings" settlements usually occur during the process of an investigation and do not involve a formal decision by the commissioners. For settled complaints, the average monetary compensation is $8,272.12. (See Figure 6.) This is not surprising given the limit of $5,000 for "hurt feeling" or damages for complaints to the CHRC during the 1978-1983 period.[13] For "no further proceedings" complaints or those resolved informally, the average amount of monetary compensation is significantly higher at $14,579.52. Reasons for the significant difference between these two types of complaints are discussed below.

What Factors Predict the Amount of Monetary Settlements?

Appendix C contains the results of a multiple regression analysis undertaken to determine if certain types of complaints increased the amount of monetary awards. Only the corporate

sample was examined, due to the small number of monetary settlements in complaints against individual respondents. The results are briefly summarized here.

Three factors significantly increased the amount of money received in a settlement:

- if the complainant was no longer in the job where the harassment occurred;
- if the complainant was working in a female-dominated industry; and
- if the case reached a disposition of no further proceedings.

In contrast, the amount of money decreased if the type of harassment experienced by the complainant was *quid pro quo* harassment. Although much attention is paid to multi-million dollar lawsuits of harassment victims in the United States, the reality for these litigations is probably closer to the findings of Stambaugh (1997). In her interviews with harassment victims, she found that those who settled their lawsuits usually received "paltry awards averaging slightly less than a year's wages" (Stambaugh 1997: 35).

What Can We Conclude about Sexual Harassment Complaint Remedies?

For remedies as a whole, it appears that the CHRC directs more remedies at poisoned environment harassment than *quid pro quo* harassment. In part, this may be a function of liability issues. Poisoned environment harassment is more likely to involve multiple harassers and multiple harassment targets. And this type of harassment may permeate the workplace in a way that *quid pro quo* harassment does not. This is the difference between a workplace where sexual gestures and comments occur on a regular basis as opposed to an individual co-worker or supervisor making requests of one harassment target. Legally, corporate respondents are liable for the harassment, and the remedies available to the CHRC may fit better with poisoned environment harassment.

Our results also highlight how complaints going through conciliation are more likely to result in remedies of monetary compensation, letters of apology and harassment-sensitizing classes. More systemic remedies, including a variety of remedies and harassment-sensitizing classes, are more likely to occur in officially sanctioned settlements than in informal ("no further proceedings") settlements. And while informal settlements may lead to slightly higher monetary compensation for complainants, it appears to be at a cost of other remedies that may have a broader effect on the workplace as a whole. Complainants may not always see the need for systemic action and may simply wish to settle their complaint quickly (Dupuis 1998: 28). As well, another possible interpretation is that some companies agree to a higher pay out to end the situation quickly. In this way, they hope to avoid orders from the CHRC to incorporate structural or comprehensive remedies designed to change the workplace culture within their organization. Overall, the CHRC must balance the wishes of complainants with the CHRC's responsibility to remedy systemic discrimination and harassment.

4. POLICY RECOMMENDATIONS AND CONCLUSIONS

We now discuss some policy recommendations based on the results of our report. We follow this with a discussion of future research needed to evaluate the CHRC and alternative complaint models.

Policy Recommendations

1. *We recommend that conciliation, after an investigation, is not abandoned.* Although this process may be slow, it works. Our research shows that conciliation, while increasing the time to resolution, leads to more systemic remedies that have the potential to alter harassment-prone workplace cultures than do remedies in informal settlements. Keeping conciliation after the investigation is also key. This is an important point about mediation. Conciliation works because there is an investigation and, hence, there is something to mediate. Yet, in these times of fiscal constraint and overloaded human rights dockets, many human rights commissions are moving to early resolution procedures or early mediation (Johnson and Howe 1997). Yet, if the complaint is still contested by the respondent, mediation may be difficult. As well, early mediation and conciliation may become more a tool of clearing the docket than reaching good settlements. Related to this, allowing too much discretion in the decision making of front line human rights officers could lead to inconsistent decisions. We repeat our earlier quote, "rushed justice may be justice denied" (R. Dworkin 1978, quoted in Johnson and Howe 1997: 19).

2. *To overcome the problem of effective but slow justice, more needs to be done to give female complainants immediate relief from their harassment.* The CHRC, in its current role, does not have the ability to stop harassment immediately nor remove problem individuals from the workplace. As a result, there is a need to provide resources outside the CHRC, such as including sexual harassment in provincial and federal occupational health and safety legislation. This would allow women to demonstrate that they work in a dangerous workplace and need immediate action to make it safe.

3. *We recommend that the CHRC regularly use a variety of remedies.* As it stands now, monetary settlements are the most common remedy. These should not be abandoned, but it should be recognized that most monetary settlements provide marginal compensation and may not be high enough to act as deterrents. We encourage the increased use of systemic remedies that alter the culture of the workplace, such as requiring employers to re-evaluate their sexual harassment policies, providing training to employees, supervisors and human resource managers that handle sexual harassment complaints and posting formal apologies for the harassment. Recent social science research shows that companies with proactive sexual harassment policies and procedures that inform and educate their employees about harassment, reduce the occurrence of poisoned environment harassment (Gruber 1998). Remedies that involve the whole workplace, not just the individuals involved, have the potential to reduce dramatically the amount of sexual harassment (and other types of harassment) found in workplaces.

Our results show that corporate respondents with prior complaints against them are less likely to be asked to amend their sexual harassment policy than respondents with no complaints against them. Respondents with a history of harassment problems need to re-evaluate their policies and procedures. Having a policy is not enough. It must be one that is effective. While we collected data on prior offences, it is not clear if this information is readily available to CHRC staff and commissioners. If not, this information should be collected as part of the case management system. Knowing about prior complaints of a similar nature will provide important information for commissioners' decision making at the remedy stage of the CHRC complaint process.

Recommendations for Future Research

1. *We recommend a national study of a sample of organizations to assess the content and effectiveness of sexual harassment policies and processes.* Our study has shown that, in the early years of our study (1978-1983), the Canadian Human Rights Commission attempted to ensure that companies implemented harassment polices and processes for their employees. This trend has declined in recent years which may be due to the fact that most companies, larger organizations at least, now have such programs in place. However, having these programs is one issue while their effectiveness is another. Little research has been done on what constitutes an effective policy. This is a crucial missing piece in our understanding of what it takes to remedy sexual harassment.

2. *Currently, early mediation is the latest proposed solution for quickly and effectively handling sexual harassment complaints.* Yet, there is little (if any) research on the types of settlements achieved through mediation, how complainants and respondents view the process, and the costs of the process. (In some instances, complainants may need legal representation.) Our research hints at some of the problems with mediation. While informal settlements may result in slightly higher monetary compensation, these settlements generally do not result in the complainants getting their job back. Moreover, they seldom result in structural workplace remedies, such as harassment-sensitizing classes and policy evaluation, that will ensure future workers are not subjected to sexual harassment.

   Evaluations of both the employer and the human rights commission mediation are needed. For example, the CHRC has an early resolution procedure. Our data did not allow us to tap into this issue. But future research should compare these types of settlements to those that follow an investigation and conciliation. Also, provincial human rights commissions, such as in Ontario, have moved to early mediation. Access to these settlements and complaints would allow researchers to examine whether the quality of remedies is satisfactory. Finally, within mediation, there is the likelihood that repeat players (or those who already went through mediation) and those with "deep pockets" may have more bargaining power. This favours corporate respondents over both individual complainants and respondents.

Care must be taken in analyzing whether early mediation processes remain fair for all parties involved in human rights complaints. Related to this, research is needed into the effect of legal representation for human rights complainants. In particular, the human rights process was designed to be a "lawyer-less" process. But, some complainants choose to have legal representation. Do these complainants fare better, in terms of time to resolution and remedies, than complainants without representation?

3. *We recommend that the Canadian Human Rights Commission begin to gather more demographic and situational information about complaints that are filed.* While issues of confidentiality would have to be ensured, this information is important for three reasons.

   First, it is important to document who these women are to identify the subgroups filing complaints to the CHRC. For example, what types of women are more likely to file complaints? Are only experienced workers filing complaints?

   Second, it is important to gather more demographic information on who is doing the harassing. Similar to the examples just described, are younger males or single males more likely to harass compared to older males or married males?

   Finally, what situational characteristics lead women to file complaints? Do these women have knowledge of existing complaint procedures? Are certain workplaces under the jurisdiction of the CHRC more prone to particular types of sexual harassment?

   Without detailed information, it is difficult to evaluate the fairness of CHRC procedures. In particular, the issue of whether similar facts result in similar results needs to be evaluated (Johnson and Howe 1997). That is, do similar types of complaints to the CHRC result in similar types of dispositions and remedies? This question is crucial, especially in a procedural context of conciliation and negotiation. The compromise making that occurs in these procedures must not lead to differing types of justice allocated to the same situation.

Conclusion

Our analysis of sexual harassment complaints to the CHRC highlights what factors lead to complaint settlement, the average length of time for complaint resolution and the type of remedies commonly available from the CHRC. What can women expect from the CHRC? They can expect a relatively fair process albeit a long process. What they cannot expect is immediate relief from their harassment. For remedies, female complainants can expect some type of monetary compensation and maybe a letter of apology. Less likely are more structural remedies, such as harassment-sensitizing classes and policy changes, that may make the workplace culture free from harassment. Given that most sexual harassment complainants to the CHRC are no longer in their job when they file a complaint, these structural remedies may be of less concern to these women than "making themselves whole" again. Yet, these structural remedies are more likely to create harassment-free workplaces than the more individualized remedies.

BIBLIOGRAPHY

Backhouse, C. and L. Cohen. 1979. *The Secret Oppression: Sexual Harassment of Working Women*. Toronto: McMillan.

Bell and Korczak v. *The Flaming Steer Steakhouse Tavern Inc.* (Ont. 1980), 1 CHRR D/155 (Shime).

CHRC (Canadian Human Rights Commission). 1983. *Unwanted Sexual Attention and Sexual Harassment: Results of a Survey of Canadians*. Ottawa: Ministry of Supply and Services Canada.

———. 1998. *Filing a Complaint with the Canadian Human Rights Commission.* Ottawa: Minister of Public Works and Government Services.

Cleveland, J.N. and K. McNamara. 1996. "Understanding Sexual Harassment: Contributions from Research on Domestic Violence and Organizational Change." In *Sexual Harassment in the Workplace*. Edited by M.S. Stockdale. Thousand Oaks, CA: Sage. pp. 217-40.

Coles, F. 1986. "Forced to quit: sexual harassment complaints and agency response." *Sex Roles.* 14: 81-95.

Dupuis, Renée. 1998. *The Canadian Human Rights Commission and Sexual Harassment Complaints*. Ottawa, CHRC.

Fitzgerald, L., S. Swan and K. Fischer. 1995. "Why didn't she just report him? The psychological and legal implications of women's responses to sexual harassment." *Journal of Social Issues.* 51: 117-38.

Frideres, James S. and William J. Reeves. 1989. "The ability to implement human rights legislation in Canada." *Canadian Review of Sociology and Anthropology*. 26, 2: 311-32.

Grahame, K.M. 1985. "Sexual harassment." In *No Safe Place: Violence Against Women and Children*. Edited by Connie Guberman and Margie Wolfe. Toronto: Women's Press. pp. 109-26.

Gruber, J.E. 1998. "The impact of male work environments and organizational policies on women's experiences of sexual harassment." *Gender and Society.* 12, 3: 301-20.

Gruber, J.E. and M. Smith. 1995. "Women's responses to sexual harassment: A multivariate approach." *Basic and Applied Social Psychology.* 17, 4: 543-62.

Gutek, B. 1996. "Sexual Harassment at Work: When an Organization Fails to Respond." In *Sexual Harassment in the Workplace*. Edited by M.S. Stockdale. Thousand Oaks, CA: Sage. pp. 272-90.

Harris v. *Forklift Systems*. 510 U.S. 141 (1993).

Howe, R.B. and M. Andrade. 1994. "The reputations of human rights commissions in Canada." *Canadian Journal of Law and Society*. 9: 1-20.

Janzen v. *Platy Enterprises* (Con. 1989), 10 CHRR D/6205 (Dickson); appealed from (1986), 8 CHRR D/3831 (Man. C.A.); rev' d (*sub nom. Janzen* v. *Pharos Restaurant*) (1986), 7 CHRR D/3309 (Man. Q.B.); aff' g (1984), 6 CHRR D/2735 (Man. Bd. Adj.).

Johnson, D. and B. Howe. 1997. "Human rights commissions in Canada: Reform or reinvention in a time of restraint?" *Canadian Journal of Law and Society*. 12, 1: 1-34.

Lindenberg, K.E. and L.A. Reese. 1996. "Sexual harassment policy: What do employees want?" *Policy Studies Journal*. 24, 3: 387-403.

MacKinnon, C. 1978. *Sexual Harassment of Working Women*. New Haven: Yale University Press.

Robichaud v. *Brennan (Can. 1983)* 4 C.H.R.R. D/127 (Review Tribunal).

Rowe, M. 1996. "Dealing with Sexual Harassment: A Systems Approach." In *Sexual Harassment in the Workplace*. Edited by M.S. Stockdale. Thousand Oaks, CA: Sage. pp. 241-73.

Smart, Carol. 1995. *Law, Crime and Sexuality*. Thousand Oaks, CA: Sage.

Stambaugh, P.M. 1997. "The power of law and the sexual harassment complaints of women." *NWSA Journal*. 9, 2: 23-42.

Tangri, S., M. Burt and L. Johnson. 1982. "Sexual Harassment at Work: Three Explanatory Models." *Journal of Social Issues*. 38: 33-54.

Terpstra, D. and D. Baker. 1988. "Outcomes of sexual harassment charges." *Academy of Management Journal*. 31: 185-94.

———. 1992. "Outcomes of federal court decisions on sexual harassment." *Academy of Management Journal*. 35: 181-90.

Welsh, S. and J.E. Gruber. 1999 (forthcoming). "Not taking it anymore: Women who report and file complaints of sexual harassment." *Canadian Review of Sociology and Anthropology*.

Welsh, S. and A. Nierobisz. 1997. "How prevalent is sexual harassment? A research note on measuring sexual harassment in Canada." *Canadian Journal of Sociology.* 22, 4: 505-22.

Welsh, S., M. Dawson and A. Nierobisz. 1999. "Do extra-legal attributes matter: Sexual harassment complaints and the Canadian Human Rights Commission." Presented at the annual meetings of the American Sociological Association. Chicago, IL (August 9).

APPENDIX A: DESCRIPTION OF VARIABLES

Dependent Variables

Dispositions

This dependent variable had three possible dispositions: case settled, no further proceedings and case dismissed. Each disposition was measured separately for various analyses (1 = the particular outcome being examined; 0 = absence of that outcome). Of particular interest, was whether or not a case was settled, either formally or informally. Formal settlements are generally those approved by the CHRC and agreed to by the parties involved. Informal settlements are those where the matter is resolved informally or privately between the parties involved, often before the CHRC completes its investigation. To capture these cases, a fourth disposition variable was constructed (1 = cases settled informally or formally; 0 = cases that were dismissed, primarily due to lack of evidence).

Related to this, the amount of time a case takes to reach resolution and the factors that either prolong or speed up this process are a concern for both the complainant and the employing organization. To capture this, we employed a continuous measure of time to resolution that totals the number of months that elapsed from the time a case was officially opened to the final disposition, regardless of the outcome.

Remedies

Whether or not a case is settled, either formally or informally, is only one decision that has to be reached in these proceedings. Once a case is settled, a remedy has to be decided on. There are four major remedies for sexual harassment cases: a monetary settlement, a letter of apology, a directive to attend a harassment sensitizing class and, finally, an order to implement a harassment policy within the employing organization (if one does not already exist). Each of these four remedies was coded as a separate outcome (1 = the existence of that remedy; 0 = if that remedy was not incorporated). Separate analyses were conducted to see what factors predicted what remedies. Finally, a variable was constructed to capture those cases in which more than one remedy was used.

Related to this, because monetary settlements are a source of concern for both complainants and respondents alike, it is important to examine the relationship between characteristics of sexual harassment complaints and the amount of monetary settlements. We used a continuous measure of the amount of monetary awards received in cases informally or formally settled.

Independent Variables

Various independent variables were identified as having potential effects on the above dependent variables, including characteristics of the case, the sexual harassment and the employing organization. The first variable measures both the type and severity of harassment experienced by the complainant. Previous research shows that complaints involving severe forms of sexual harassment, such as sexual assault and propositions linked to threats of employment loss, increase the odds of a case being settled favourably for the complainant

(e.g., Terpstra and Baker 1988). We use a multi-dimensional measure of sexual harassment, reflecting current research that demonstrates that sexual harassment behaviors tend to co-occur. (Gruber et al. 1996; Schneider et al. 1997). We used latent class analysis (not reported here, available from authors on request) to create a dichotomous sexual harassment variable. Type of harassment was coded 1 if it comprised "coercive sexual behaviour." In these cases, unwanted sexual attention is common. This may include being stared at and/or inappropriately touched. Sexual coercion or *quid pro quo* harassment may also be present. In other words, this type of harassment involves behaviours that are overtly sexual and directed at particular individuals. The reference category was poisoned environment harassment that includes both gendered and sexual derogatory comments and actions that may permeate the workplace. While some of the harassment in these cases was personally directed at particular individuals, other harassment, such as the presence of sexual posters and general comments about the inability of women to perform their jobs, was not.

A second variable captures employment consequences due to the harassment. Loss of job measures whether the complainant was still in the job where the harassment occurred at the time the complaint was filed (1 = not in job). Most women not in their jobs quit, were fired or were forced to resign. A small number were on sick leave, transferred to another position or demoted. Psychological distress, the second variable measuring employment consequences, indicates psychological damage resulting from the harassment (distress equals 1).

Because there is growing awareness about sexual harassment as a problem in both society and the workplace, time is an important factor when examining responses to this phenomenon. Two separate dummy variables are included to capture the effects of legal precedents, representing two periods, 1984 to 1989 and 1990 to 1993. The reference category comprises early cases filed between 1978 and 1983. In 1984, the Human Rights Tribunal decided in *Robichaud* v. *Brennan* that the complainant had experienced sexual harassment and hence, the respondent must show that his behaviour did not constitute sexuai harassment. The period from 1989 to 1993 represents complaints filed after the Canadian Supreme Court decision in *Janzen* v. *Platy*. We hypothesized that later cases would have a greater likelihood of being settled because *Robichaud* and *Janzen* set legal precedents for circumstances under which corporate respondents are liable for the sexually harassing behaviors of employees and for what constitutes sexual harassment.

The employing organizations' history of sexual harassment complaints may also have a potential effect on dispositions in such cases. In studies of criminal cases, the defendant's prior criminal record is often considered an indicator of respectability (Black 1993). For third-party mediation, respectability may stem from how often previous complaints have been filed against a corporate entity or individual. Just as respectability in the criminal realm varies across social space, so does respectability in the realm of workplace disputes, in general, and sexual harassment complaints, in particular. We hypothesize that a company facing a complaint of sexual harassment with no previous history of complaints may be perceived as more respectable by the CHRC than a company having a number of previous complaints. Those companies with only one complaint recorded for the entire study period were coded as 0. Those cases in which a company had two or more complaints filed against it during the

study period were assigned values according to the number of cases that had preceded the case in question. For example, if there were three sexual harassment cases recorded for one organization during the study period, and the case in question was the most recent, that case was assigned a value of 2 on the general respectability variable (i.e., two complaints before the current one). This variable was entered as a dichotomous measure to capture whether or not an employing organization had a history of prior complaints (1 = history of prior complaints).

To measure case processing, whether or not the complaint was sent to conciliation is used. During the complaint process, the CHRC has the option of sending a case to conciliation in an effort to bring about an agreement between, or among, the parties involved. This generally occurs when the investigation found evidence of sexual harassment and when there was some likelihood the complainant and respondent might reach a settlement. Because cases sent to conciliation are likely those with corroborating evidence of harassment, this variable may also act as a proxy for the quality of evidence available. Complaints sent to conciliation by the CHRC are coded as 1. Complaints not sent to conciliation are coded as 0.

Several variables measure what are often referred to in socio-legal literature as "extra-legal" attributes of individuals involved in the sexual harassment complaints. These are characteristics that should have no legal relevance to a case, but may, in fact, influence the final disposition. The first variable in this group captures the harasser's organizational position in relation to the complainant. A position of authority was coded 1 if the alleged harasser had supervisory authority over the complainant. This includes both those with a formal title of supervisor as well as instructors or other workplace leaders. If the harasser was a co-worker, the position of authority was coded as 0. Second, employment status was coded 1 if the complainant was a temporary worker or still on a probationary period. If the complainant was a full-time worker, work status was coded as 0. Finally, we also included occupation of the complainant, measured as a dummy variable. Those coded 0 are professional and managerial employees. Those coded 1 are pink- and blue-collar workers.

Four variables measured characteristics of the organization and might also be considered extra-legal factors. Company type was entered as a dichotomous variable comparing private and public institutions/companies. Organization type was coded 1 if it was a private, non-governmental corporation and 0 if it was a federal organization (including the Canadian Armed Forces). Two other measures of organizational characteristics are number of employees or size of the organization and the annual sales of the organization. The structure of the employing organization is also relevant for understanding the outcome of complaints. Due to the skewed nature of these variables, both were converted to the natural logarithm. In our analysis, we incorporate the context of the employing organization, in particular, the extent to which organizational size and profitability matter for the outcome of sexual harassment complaints.

A fourth variable captures whether or not the complaint originated from a female-dominated industry. Information for this variable was taken from the *Labour Force Historical Review* (1997). This document provides yearly estimates of the numbers of male and female

employees in industrial categories. Most of the major industrial categories identified in the Census of Canada and the Labour Force Survey are supplied in the historical review. Missing are gender composition percentages from the Armed Forces. For this analysis, those complaints from the Armed Forces were assigned the average industry sex composition value. An industry was categorized as female-dominated if the proportion of female employees exceeded 60 percent and as male-dominated (the reference category) if female employees comprised less than 30 percent of the employees. The remaining industries, where male and female employees were equally represented, were entered as a separate variable.

Finally, we included two contextual variables concerning the sexual harassment itself, the number of harassers and the number of complainants involved in each case. Cases that involved more than one harasser or victim were coded as 1 while those complaints involving only one harasser or victim were coded as 0.

APPENDIX B: MULTIPLE REGRESSION ANALYSIS FOR TIME TO RESOLUTION

Table B-1: Coefficients for Regression of the Amount of Time to Resolution[a] on Various Case Characteristics, 1978-1993, Female Complainants, Corporate Respondents

Variable	Coefficient
Loss of psychological occurred	1.38
Complainant job status	2.22
Sexual coercion	-2.48
Year of complaint 1984-89	11.49***
Year of complaint 1990-93	5.25
Previous complaints	4.36**
Conciliation occurred in complaint	17.03***
Harasser in authority	2.60
Employment status	1.04
Occupation dichotomy for complainant	2.072
Organizational dichotomy – federal or non-federal	0.214
Number of harassers	-2.07
Others harassed dichotomy	3.49*
Number of employees	4.33E-02
Annual sales	0.92**
No further proceedings	-1.52
Complaint settled	-2.78
Industry, equally male and females	2.00
Industry, female dominated	-3.00
Constant	-12.46

Notes

*p<.10 **p<.05 ***p<.01

[a] Dependent variable: time to resolution (in months).

APPENDIX C: MULTIPLE REGRESSION ANALYSIS FOR MONETARY REWARD

Table C-1: Coefficients for Regression of the Amount of Monetary Award in Settled Cases on Various Case Characteristics, 1978-1993, Female Complainants, Corporate Respondents

Variable	Coefficient
Loss of psychological occurred	1.71
Complainant job status	28.49**
Sexual coercion	-18.73*
Year of complaint 1984-89	8.58
Year of complaint 1990-93	0.49
Previous complaints	4.07
Conciliation occurred in complaint	11.93
Harasser in authority	5.48
Employment status	7.66
Occupation dichotomy for complainant	2.80
Organizational dichotomy – federal or non-federal	4.82
Number of harassers	16.38
Others harassed dichotomy	-10.78
Number of employees	0.87
Annual sales	-3.66
No further proceedings	27.24*
Industry, equally male and females	-4.21
Industry, female dominated	45.23***
Constant	100.60

Notes
*p<.10 **p<.05 ***p<.01

ENDNOTES

[1] Men comprised about five percent of the sexual harassment complainants during the period of this study.

[2] Throughout this report we refer to these types of settlements as informal. For formal settlements, a Minutes of Settlement form is usually included in the CHRC file and has been approved by the commissioners. Informal settlements are those negotiated during the investigation process and may be the result of private negotiations between the complainant and the respondent. Often, these types of settlements result in a disposition of "no further proceedings," the settlement is not sent to the commissioners for approval and the complaint is considered resolved.

[3] As stated in s. 65(2) of the *Canadian Human Rights Act*, employers are not held liable for the actions of an employee "if it is established that the...organization...exercised all due diligence to prevent the act or omission from being committed and, subsequently, to mitigate or avoid the effect thereof."

[4] *Quid pro quo* harassment is the legal term for sexual harassment that includes sexual solicitation involving a work-related threat or promise (e.g., loss of job, promotion).

[5] For non-governmental organizations, annual sales are taken from published sales numbers in the Key Business Indicators documents. Annual sales for government departments and agencies are calculated as the total budget for the department or agency in a given year. Although this is technically not "sales," it is an approximation of the relative worth in monetary terms of government departments and agencies.

[6] To reduce the amount of statistical language in the report, we note where there are significant relationships but do not always provide the statistics used to determine significance. Where noted, some results are available in the appendices. As well, all results are available from the authors.

[7] As discussed later in the report, complaints that go through conciliation take longer to reach a resolution than other complaints. So while there is a higher likelihood of settlement for complaints undergoing conciliation, it comes at a cost in terms of time.

[8] Our earlier research (Welsh et al.1997) provides more details concerning the gendered context of the law. A full discussion of this issue is outside the scope of this report. Of concern is the issue that victims of racial harassment do not face similar criteria, showing psychological distress, as do victims of sexual harassment (e.g., Fitzgerald et al. 1995).

[9] The length of time also adversely affects respondents, but this issue is beyond the scope of this report.

[10] One case was excluded from these analyses as it took an unprecedented amount of time to reach a resolution. The individual respondent sample is not analyzed because there are insufficient numbers for multivariate analysis.

[11] Johnson and Howe (1997) also encourage human rights commissions to be cautious in the use of conciliation and mediation. Conciliation is a process of compromise making that "should never result in compromised rights" (R. Dworkin quoted in Johnson and Howe 1997: 19). Here, the CHRC seems to have found an appropriate balance for, as the following section on remedies shows, complaints going through conciliation result in broader remedies than other complaints.

[12] The CHRC published an employer's guide for anti-harassment policies for the workplace in December 1998. These policies represent some of the "best practices" for harassment policies. Yet, there has still been no systemic research on whether or not these policies are effective for encouraging people to report harassment and/or diminishing the amount of harassment in workplaces.

[13] The limit for "hurt feelings" was $5,000 until Bill S-5 was enacted in June 1998. Under the current statute, the limit is $20,000.

Status of Women Canada Policy Research Fund

Title: _____

We Value Your Feedback

Your comments and suggestions can help us make sure our publications are useful. If you have a moment, please answer and return the following questionnaire. Thank you for your time.

1. Was the report useful to you? (5 = extremely useful) (1 = not very useful) 5 4 3 2 1

   a) Which part of the report did you find most helpful?

   _____

   _____

   b) How could it have been more helpful?

   Comments: _____

   _____

   _____

   _____

2. How did you use the report? As a tool in:

   Policy development ☐ Policy research ☐ Advocacy ☐

   Other: _____

   _____

3. Are you affiliated with:

   Women's Organization ☐ Federal Government ☐

   Other Non-Governmental Organization ☐ Provincial/Territorial Government ☐

   Municipal Government ☐

   University/College ☐

   Other: _____

   _____

Please return this questionnaire by mail or fax to:

Status of Women Canada
Research Directorate
360 Albert Street
Suite 700
Ottawa, Ontario K1A 1C3

Fax: (613) 957-3359